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# CODE PLEADING

AS

# INTERPRETED

BY THE

# COURTS OF MISSOURI

BY

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OF THE ST. LOUIS BAR

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# PREFACE.

Few men have entered the profession with stronger prejudices against the code system of pleading than I. My law studies were pursued under the guidance of one trained in the common-law practice, and I had become thoroughly imbued with a belief in its surpassing excellence. But in the course of a practice extending through more than thirty-five years, I have been brought to see the advantages of the present simple, but absolutely logical, system, and am fully converted to the belief that under that system, rather than by the common-law methods, the nearest approximation to absolute justice is to be attained. I am convinced that, if the rules of pleading and practice which are contained in the Missouri statutes are faithfully administered, this result will follow. I am equally convinced that any attempt to blend the old system with the new can result only in confusion and detriment. With these convictions I have undertaken this work on Pleading. My earnest hope is that it may tend, in some degree at least, to hasten the advent of the day when the Code will be cordially accepted by both bench and bar for what it is intended to be — the one and only rule of practice in our courts. The principles upon which the reformed procedure are based are clearly set forth in the Reports of the New York Codifiers — a series of reports which it will well repay any lawyer to read.

While this work is primarily designed for the practitioner, I have endeavored to adapt it to the needs of the law student also, and trust it may be found useful in connection with the study of Pleading. Nothing is more important for the law student, and the remark applies as well to the practitioner, than that he be well grounded in the rules and underlying principles of pleading. He should read and re-read this volume, until he becomes thoroughly familiar with the lessons to be drawn from the decided

cases. And I venture the prediction that he who adopts the habit of carefully studying the book at least once in each year will be the one who will have the advantage which necessarily comes from accurate and scientific pleading.

It is proper to state that in a very few instances I have cited cases which originated before a justice of the peace, for the reason that the principle involved in them was equally applicable to cases originally instituted in a court of record.

EVERETT W. PATTISON.

ST. LOUIS, *March 1, 1901.*

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# MISSOURI CODE PLEADING.

## INTRODUCTORY CHAPTER.

The Code of practice constitutes a radical departure from the common-law procedure. It is not a modification, not even a reformation. It creates a new system. It was designed to abolish old rules, old methods, old technicalities, and to establish a new method of procedure, adapted to the plain and simple, but progressive, habit of American thought. It does not aim to cure the evils of the common-law practice. It is designed to wipe out altogether that practice, and substitute one entirely new. As is said by Sherwood, J., in *Elfrank v. Seiler:*[1] "Our statute respecting practice in civil cases has worked a radical change in the rules of pleading which formerly prevailed when the common law had sway; and now, instead of being decided by Chitty, the sufficiency of the pleading, except where otherwise specially provided, is to be measured by our practice act. And by reason of such change many trips and false steps, which under the old regime would have proved fatal, are matters of no moment." (p. 136.)

Yet it would be too much to expect that judges and lawyers, who had been trained under the common law, and who knew no other practice, who had been taught to look upon that system, with all its defects, as *summum bonum*, would willingly accept its complete overthrow. Especially ought one not to expect that they would readily acquiesce in a change which, so far as it affects parties and pleadings and mere forms, tends to eliminate the distinctions between legal and equitable proceedings. The whole tendency of the mental training of the profession at the time the Code was first launched in New York was such as to lead them to consider such a statute one in derogation of the common law, and hence to give it effect only so far as it was unquestionably inconsistent with the common law. To quote again

[1] 54 Mo. 134.

from Judge Sherwood: "It is a fact, it would seem, not generally recognized, that we have in this state a code; that by that code are provided the forms of all pleadings, and the rules by which they are to be tested."[1]

In no one particular is the unwillingness of courts to depart from the old rules more signally manifest than in the ruling as to the necessity of a promise in actions in the nature of *assumpsit*. The general rule at the common law was that a promise must be averred in such cases. In fact it was this element of a promise which constituted the action of *assumpsit*, and differentiated it from other actions, such as that in debt. It was not necessary that the promise should in fact have been made. In almost every instance it was not made. It was a pure fiction of the law. But it must nevertheless have been pleaded as made. This promise was in the fullest sense of the term a conclusion of law. Under the code system, which precludes the pleading of conclusions of law,[2] it had no place in the petition. And this is so held by the Kansas City court of appeals in *First National Bank v. Landis*.[3] But, as will be seen when I come to the discussion of this point in the chapter on The Petition (ch. 15, § 343), the weight of authority in this state is that the promise must be pleaded, all the appellate courts having so decided.

Had the Code been accepted for what it was, an entirely new mode of practice, based upon a theory radically distinct from that out of which the common-law procedure grew, it would have speedily developed into a simple, harmonious and symmetrical system. For the common-law practice was based upon the theory that form was essential. The Code is based upon the theory that form is of not the slightest consequence. If the pleader states his cause of action or his defense concisely, in language that a man of ordinary intelligence can understand,[4] and so states either that the adverse party can never again be called upon to answer to it, he has complied with its behests. The keynote to code pleading is simplicity. It requires "a plain and concise

[1] Pomeroy v. Benton, 57 Mo. 531, 550.

[2] Rev. Stat. 1899, secs. 610, 631.

[3] 34 App. 433.

[4] The Code as first enacted in this state contained after the words "a plain and concise statement of the facts," etc., the following clause: "and in such a manner as to enable a person of common understanding to know what is intended." (Laws 1849, p. 79, sec. 7.) While this clause has been omitted in the various revised statutes, it nevertheless shows the intent of the law-maker.

statement of the facts." But that is absolutely all that it requires.[1]

It is a logical conclusion that the effect of this change in procedure is to abolish all differences between legal and equitable causes of action, except so far as such distinction is inherent in the primary rights and duties to be enforced, and so far also as the distinction is requisite to the determination of the mode of trial. In other words, there is in Missouri but one method of pleading. And therefore the Code, when properly administered, and when its principles are faithfully followed, tends necessarily to create simplicity. That this conclusion as to legal and equitable proceedings has not been fully accepted by the courts, will appear hereafter. But that such is the logical conclusion cannot, I think, be gainsaid. And that our judges are rapidly coming to acknowledge the radical nature of the change effected by the Code is equally apparent. The occasional exception only emphasizes the prevalence of the rule. Our supreme court has recently said that the object of all judicial proceedings should be the attainment of right and justice, and that in courts of equity the rules of procedure admit of greater flexibility to accomplish this object than the more strict rules of law.[2] Is it not a reasonable conclusion that the object of the Code in abolishing the distinction between legal and equitable proceedings, so far as concerns questions of form, and leaving those distinctions in existence in matters of substance only, was that all proceedings, whether formerly designated as legal or as equitable, should possess the flexibility formerly attached only to equitable proceedings?

As showing the gradual change in the views of our courts, both as to the intent and as to the effect of the new procedure,

[1] In the words of Mr. Pomeroy: "The fundamental conceptions embodied in the American system are natural and true. They are in perfect accord with the experience of mankind as shown in the history of legal development from an infancy of rude barbarism to a maturity of enlightened civilization. The whole course of such development consists in disregarding rules, modes, and institutions, which were arbitrary and formal, and in bringing the law into an agreement with abstract justice and pure morality. We have now reached the stage when, by an act of legislation, our judicial proceedings have in theory at least been made simple, when natural methods have taken the place of the artificial, when the sole object of a forensic trial is to arrive directly at the truth, and when the search after the truth is not confined to any prescribed forms nor shut up between any rigid barriers."

[2] Haseltine v. Smith, 154 Mo. 404.

I give some extracts from early and later opinions of the appellate courts. In *Edgell v. Sigerson*[1] it is said: "The common-law definition of a pleading is, 'the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense,' which is the very language used by our code in defining a complaint and answer. Facts, and facts only, are to be stated. The pleader must not descend into a mere detail of the evidence, nor stop short at general conclusions of law, but must set down the issuable facts and them only. This is the language of both systems, but it must be understood according to the necessities of the case to which it is applied. No system, it is believed, was ever yet put in practice in which the ultimate facts, as they actually took place, constituting the cause of action or ground of defense, were in all cases, without exception, required to be set forth. It would be utterly impracticable to do so. Indeed, perhaps the greater portion of the matters stated in pleadings are the legal results of what actually occurred, rather than the occurrences themselves as they transpired; and this is so much the case that it has been said these ultimate results are the true issuable facts, and constitute the only proper objects of averment in pleading." (p. 496.)[2]

As an instance of a broader view, I quote from an opinion written by the late Judge Lewis, when he was presiding judge of the St. Louis court of appeals, which contains an interesting discussion of the radical change which the new system has introduced. After remarking on the difficulty which the profes-

[1] 20 Mo. 494.

[2] It may not be improper for me to suggest that this extract from the supreme court's opinion is the key to much confusion which has arisen in the decisions of our courts, though it is by no means confined to our courts, but will be found in the decisions of all the code states. What the learned judge says is true of common-law pleading; but it ought not to be true of pleadings under the Code. Many of the forms of common-law actions, as settled by a long series of decisions, absolutely require the statement of "the legal results of what actually occurred." In fact, one may safely go farther and say that they require the statement of the legal results, not of facts which actually occurred, but which by legal fiction were assumed to have occurred. It is certainly very far from true that in the common-law forms of action facts were always stated as they occurred. It is probably true that such facts were seldom so stated. On the contrary, what the Code requires — and the requirement is absolute and without exception — is, that the pleader shall in all cases state the constitutive facts exactly as they occurred, and shall state them in plain and concise language without technicality, and free from mere conclusions of law.

sion experiences in getting rid of the dogmas which upheld the common-law system of pleading, he proceeds as follows: "Some of those dogmas are not merely ignored but are absolutely reversed in the modern code practice. The earliest conceptions of practical jurisprudence made the writ, or the form of approach to the temple of justice, the grand central idea upon which everything else depended. It was defined by the sovereign authority and tendered to the subject to be used only when he could show his matter of grievance to be within its exact terms. If he failed of such a showing — if he mistook by a hair's breadth in choosing between two different writs or forms,— the doors of the temple were promptly closed against him, whatever might be the claims of abstract justice as between him and his adversary. In the growing complications of human affairs it sometimes happened that a great and manifest wrong was committed by one person against another, and yet the sufferer could find no redress because a writ had not yet been invented to cover just such a case. This led to the occasional introduction of a new writ or form of action; but not until the reign of Edward I. was a general authority given by statute for the framing of new writs for cases not falling within the scope of those already in use. Thus, jurisdiction was shaped by the remedy and not by the grievance. All of which is in striking contrast with the code system, wherein the jurisdiction looks first of all to the fact of grievance demanding redress; and, asking no questions about the particular form in which the demand is made, declares that one form — the civil action — shall suffice for any and every case wherein the grievance and the right of redress shall plainly appear. It resulted from the pre-eminence given in the old system to an exact conformity with the writ, that a misjoinder of counts in the declaration was fatal to the action at whatever stage it might first be discovered. It destroyed the foundation. The whole structure must therefore fall. The objection could be raised with fatal effect by a motion in arrest or even upon a writ of error. The new system prescribes certain exact rules for the joining of various causes of action in the same petition, but for very different reasons and with very different penalties for their violation. A misjoinder involves no incongruous admixture of forms or of writs, because there is but one form and but one writ for all possible cases. There is no reason why it should be fatal to the action, *per se*, and the law does not declare it so. A cause of action *ex delicto* must not be united with one *ex contractu;* but why ? The statute

forbids it; and if a reason for the statute must be found, it seems to appear in the policy which refuses to subject a defendant, against his will, to diverse styles of warfare in the same fight. Hence it is provided that he may nevertheless waive all such objections by refusing to demur. If he accepts the fight as tendered the law will not permit him afterwards to object, nor will it find that, by reason of the misjoinder, the foundation of the action is insufficient to sustain it. The statute is explicit that, if the objection of misjoinder be not raised by demurrer or answer, it shall be deemed to be waived."[1]

In a still more recent case it is said by Barclay, J.: "A radical change in the forms of pleading was a corner-stone in the proposed reform."[2]

An interesting instance of adherence, even in modern times, to common-law rules, notwithstanding the provisions of the Code, is found in *Donahue v. Bragg*.[3] In that case it was urged by defendant that the causes of action on which several plaintiffs had brought suit were several and not joint, and it is said that, while the point is technical, and does not affect the equitable merits of the controversy, yet if well taken it must necessarily lead to a reversal of the judgment by the appellate court, because it is an elementary proposition that parties having several rights against the same defendant cannot enforce them in a joint action against him if he objects. (p. 274.) Yet we have a provision in this state that a "judgment may be given for or against one or more of several plaintiffs."[4]

I have already adverted to the ruling as to the necessity of pleading a promise, even where the promise is a mere fiction of law.[5] In what I cannot consider other than a like disregard of the mandate of the Code, our courts also hold that it is still permissible to frame a petition for money had and received in accordance with the common-law form.[6]

I desire, however, to impress upon the reader that the change introduced by the Code does not go to the extent of requiring less or more material allegations in a petition than were necessary to constitute a cause of action at common law, but only obviates the necessity of using those formal and technical aver-

[1] Sumner v. Tuck, 10 App. 269, 276.
[2] Stillwell v. Hamm, 97 Mo. 579, 585.
[3] 49 App. 273.
[4] Rev. Stat. 1899, sec. 767.
[5] Page 18, *ante*.
[6] Pipkin v. National Loan Ass'n, 80 App. 1.

ments which were necessary, and for which, under the rules of the common law, no other mode of stating the same thing could be substituted.[1] Pleading under the Code has nothing to do with the old forms of procedure.[2] If the rules of the common law were designed to apprise the parties of what is affirmed or claimed upon the one side, and what is denied on the other, these rules have been broadened and deepened by the Code.[3]

As illustrating these rules, take the case of goods sold to be paid for by note or bill. At common law if the purchaser failed to give the note or bill, the vendor could not maintain *assumpsit* on the general count for goods sold and delivered until the time had expired for which the note or bill was to run; but he might immediately bring an action for breach of the special agreement, and his damages would be the price of the goods. Inasmuch as the Code abolishes the old forms of action, a petition is good if such facts appear in it as would justify a judgment at common law under either of the above forms of action.[2]

One of the purposes of the Code is to substitute specific and concise statements of the actual facts of each controversy for the more general declarations of demands formerly in use in courts of law, and the unnecessarily prolix and elaborate pleadings in chancery. The object in view is to have the defendant fully advised in each case of the precise complaint he is called upon to meet.[4] A petition may be inartificially and clumsily drawn, and may even be incoherent, yet if, taken altogether, it states a cause of action, it is sufficient.[5] And such a petition is, unless objection to it is made either by demurrer or answer, as valid to all intents and purposes as though prepared by the most skilful hand.[6] Thus, in *Battel v. Crawford*,[7] the supreme court uses this language: "The petition is extremely inartificial, but it contains the substance of a good complaint. The conversion by the defendant of the special deposit is substantially alleged; and while the petition is lacking in formality and precision, yet in view of the duty imposed by statute to distinguish between form and substance, we think we would be manifesting a fastidious

[1] Conway v. Reed, 66 Mo. 346; Sumner v. Tuck, 10 App. 269, 276.

[2] Globe Light & Heat Co. v. Doud, 47 App. 439.

[3] Mellor v. Mo. Pac. R. Co., 105 Mo. 455.

[4] Rush v. Brown, 101 Mo. 586, 590.

[5] Lynch v. St. Joseph & S. R. Co., 111 Mo. 601; Putnam v. Hannibal & St. J. R. Co., 22 App. 589; State ex rel. v. Carroll, 63 Mo. 156.

[6] Ellrank v. Seiler, 54 Mo. 134.

[7] 59 Mo. 215.

regard for exactness in pleading, without precedent since the adoption of the Code, were we to turn the plaintiff out of court on this point."

At common law different attachment creditors could not sue jointly to set aside a fraudulent conveyance made by the debtor in the attachment. Nor could they maintain such a suit in equity. Under the provisions of the Code, however, this may be done.[1] But when several creditors so join as plaintiffs, the petition must set out all the facts which under the statute give them the right to maintain a joint suit.[2]

In closing this chapter it may not be amiss to suggest to those persons who still think the common-law practice and methods of procedure the *ultima thule* of human wisdom, and who still mourn for the ancient system, that these common-law methods and forms have been abrogated in Great Britain, and that there has been adopted in that country what is practically the American Code system — a fact which is in itself a full and significant vindication of the course taken by the Code states of this country. No one will dispute the assertion that neither the bench nor the bar of England would willingly return to the old method.

[1] Rev. Stat. 1899, sec. 416.

[2] Brumley v. Golden, 27 App. 160.

# CHAPTER I.

## LEGAL AND EQUITABLE PROCEEDINGS.


§ 1. How far they are now distinct.
3. The extent of the change.
4. Illustrative cases.
5. Flexibility of proceeding.
6. Bills of discovery abolished.
§ 7. The answer in chancery.
8. Effect of pleading an equitable defense.
12. Cases illustrating the above principles.


**§ 1. How far they are now distinct.**— The Missouri Code does not in terms abolish the distinction between actions at law and suits in equity. But when it provides that there shall be in this state but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs,[1] it certainly abolishes all formal distinctions between the two classes of suits, since the words "protection" and "prevention" refer, if not exclusively, at all events in large part, to equitable proceedings. And when it refers to legal and equitable proceedings by using the expression "heretofore denominated legal or equitable," as it does in section 593 and section 605,[2] there is manifested an intention to carry the distinction sufficiently far to make it apply to all matters excepting those of substance. The phrase "legal or equitable procedure" may be used in reference to the jurisdiction at law and that in equity, or it may refer to the distinction between the practice in actions at law and in suits in equity. From a failure to discriminate between the equitable jurisdiction and the equitable practice, when speaking of the two classes of actions, some confusion has arisen. In reference to the principles which underlie equitable and legal jurisprudence, the distinction still subsists. For, in what Mr. Pomeroy designates the "primary rights and duties," the rules distinguishing equitable from legal proceedings cannot be abrogated. It is only in the modes of procedure that the Code has effected a change, and this change does not cover the procedure in its entirety. At least our courts so held in their early interpretation of the Code, it being declared that the practice act does not confound law and

[1] Rev. Stat. 1899, sec. 539.

[2] Rev. Stat. 1899.

equity, either as to principles or modes of procedure,[1] and that the court cannot exert its equitable powers in a strictly legal action.[2] But so far as mere form is concerned, there is no question that all distinctions have been removed.

§ 2. Says the court in *Magwire v. Tyler:*[3] "Cases legal and equitable have not been consolidated. Although there is no difference between the form of the bill in chancery and the common-law declaration under our system, where all relief is sought in the same way from the same tribunal, the distinction between law and equity is as naked and as broad as ever." (p. 128.) And again it is said: "The new practice act of 1849 in a measure assimilated the forms of proceedings in cases at law and in equity."[4] That all distinction between the forms of actions at law and suits in equity has been abolished by the Code is clearly stated by Sherwood, J., in *Nichols v. Stevens*,[5] where, in laying down the rule as to pleading fraud, the learned judge says that there is no reason for saying that a petition is not good in equity unless it sets forth the facts constituting the fraud, but that it may be good at law, "because we have in this state but one form of action." (p. 118.) Yet the court recognizes that it is not merely as to forms that the distinction has disappeared. For it says in one case: "We use the old terms 'law' and 'equity' from custom and convenience, but only to indicate the different modes of trial and the kind of relief sought;"[6] thus extending the effect of the statute to something more than the forms of pleading. Though the plaintiff calls his petition a bill in equity, the court is not bound to consider it such, but may treat it as a petition in an action at law, or as any other proceeding which the facts set out therein may warrant.[7]

§ 3. **The extent of the change.**— As viewed by the courts of New York, from which state the Missouri Code is taken almost bodily, the abolition of the distinction between legal and equitable proceedings was not intended to initiate new principles of law, by which a class of rights and of wrongs not previously the proper subjects of judicial investigation or remedy can be judicially investigated and remedied. The abolition in words of the distinction between actions at law and suits in equity does not

[1] Meyers v. Field, 37 Mo. 434; Rutherford v. Williams, 42 Mo. 18.
[2] Magwire v. Tyler, 47 Mo. 115.
[3] 47 Mo. 115.
[4] Fithian v. Monks, 43 Mo. 502, 517.
[5] 123 Mo. 96.
[6] Scott v. Caruth, 50 Mo. 120.
[7] State ex rel. v. Tittmann, 103 Mo. 553; Brown v. Home Savings Bank, 5 App. 1.

have the effect to break up the well-settled principles and limits of common-law and equitable jurisdiction, and to open to courts as proper subjects of judicial discretion a class of moral wrongs or misfortunes not before the legitimate subjects of legal or equitable investigation and redress; nor was it intended to create or justify novel and unprecedented causes of action.[1] That this is also the position of the Missouri courts appears from the language of Judge Holmes in *Meyers v. Field*,[2] decided in 1866: "The distinction between law and equity," he says, "has not been abolished by the new code of practice. Equitable rights are still to be determined according to the doctrines of equity jurisprudence, and in the peculiar modes of proceeding which are sometimes required in such cases; and legal rights are to be ascertained and adjudged upon the principles of law, and the rules of proceeding at law are in many respects very different from those which are applicable to equity cases. Pleadings should be drawn with reference to these distinctions, though in the form prescribed by the statute. Where the petition is framed for legal redress, the plaintiff cannot be allowed to prove equitable rights, though the facts be stated to some extent in his petition. If he seeks equitable relief, the facts must be stated in such manner as to show that he is entitled to the relief prayed for, as under the former practice; and if he claim redress at law, the essential elements of his cause of action must be stated with such clearness and certainty as to be intelligible to professional, if not to ordinary, comprehension." (p. 441.)[3] In 1869, Judge Wagner, in *Fithian v. Monks*,[4] uses language to a like effect. He says: "The whole course of judicial decisions in this state has recognized the distinction between matters of law and matters of equity, and the courts have uniformly been considered as having a law side and an equity side in reference to this general jurisdiction. To give the court jurisdiction in equity, a case in equity must be stated in the petition; and to give jurisdiction at law a cause of action at law must be set forth." (p. 517.) And in a somewhat later case Judge Holmes, again referring to the subject, animadverts upon the error of confounding law and equity not only as to principles, but as to the mode of proceeding, as if no distinction any longer existed.[5] "The principles of equity," says Henry, J., "are

[1] Cropsey v. Sweeney, 27 Barb. 310.

[2] 37 Mo. 434.

[3] But compare § 2, *ante*, especially cases cited in note 7.

[4] 43 Mo. 502.

[5] Rutherford v. Williams, 42 Mo. 18, 23. See also a discussion of this question by the same judge in State ex rel. v. Circuit Court, 41 Mo. 574, 579.

as deeply imbedded in our law as before the adoption of the Code, and he would be regarded as a rash legislator who would propose the entire elimination of equity from our system of jurisprudence. It is so interwoven with the common law that nothing but confusion and disaster could result from a change so radical. It has not been made or attempted in this state, and any effort in that direction would be resisted by every one who duly appreciates the salutary and conservative influence of equity upon strict, inflexible law."[1]

§ 4. **Illustrative cases.**— The following decisions are in harmony with the principles above announced. Thus, it is held that where one seeks equitable relief under the Code he must state facts which would have furnished ground for such relief under the former practice.[2] If the petition is framed on the theory that it is sought to enforce equitable rights, and it appears on the trial that the plaintiff has no equities which the court is bound to enforce, his bill must be dismissed. And this for the reason that defendant is entitled to a trial of the issues by a jury, and plaintiff will not be allowed to deprive him of this constitutional right by adopting an equitable form of proceeding.[3] Therefore if it should appear, either by the allegations of the petition or by the evidence introduced at the trial, whether that evidence is introduced by plaintiff or by defendant, that plaintiff has an adequate remedy at law, his bill will be dismissed.[4] Where an action is brought to recover losses resulting from a common adventure between the parties, the rule has been steadily adhered to in Missouri, that, unless there has been a settlement between the parties, resort must be had to the equitable side of the court.[5]

§ 5. **Flexibility of proceeding.**— Our supreme court has recently said that the object of all judicial proceedings should be the attainment of right and justice, and in courts of equity the rules of procedure admit of greater flexibility to accomplish this object than the more strict rules of law.[6] But as the Code abolishes the distinction between legal and equitable proceedings so far as concerns questions of form, and leaves those distinctions

[1] Bliss v. Prichard, 67 Mo. 181, 191.

[2] Jones v. Brinker, 20 Mo. 87; Vasquez v. Ewing, 24 Mo. 31.

[3] Rutherford v. Williams, 42 Mo. 18.

[4] Humphreys v. Atlantic Milling Co., 98 Mo. 542. It is of course true, as stated by the learned judge in this case, that if a court of equity can maintain jurisdiction of the case for any purpose, it will proceed to do full justice between the parties.

[5] Scott v. Caruth, 50 Mo. 120.

[6] Haseltine v. Smith, 154 Mo. 404.

in existence in matters of substance only, it would seem to logically follow that all proceedings, whether formerly designated as legal or as equitable, should possess the flexibility which formerly attached only to equitable proceedings.

**§ 6. Bills of discovery abolished.**— Bills of discovery have been unknown to our remedial system since the adoption of the practice act, as there are now provided more convenient methods by which every purpose of such bills can be attained.[1]

**§ 7. The answer in chancery.**— The code of practice does away with the effect of the answer in chancery, and it now conforms to the practice in courts of law.[2] The case of *McQueen v. Chouteau*,[3] though it was decided subsequently to the above case, passed upon a bill and answer which had been filed previous to the adoption of the practice act in 1849.

**§ 8. Effect of pleading an equitable defense.**— An equitable defense may be set up in and to any action at law, whatever its character.[4] The doctrine which was for a long time maintained in this state, that the holder of an equitable title, or one seeking to enforce equitable rights, must resort to equity for the purpose, and that he could not at the same time enforce such equitable right or title and obtain the remedies which are administered by a court of law, has been abandoned.

§ 9. An equitable defense will not convert an action at law into one in equity, where no affirmative relief is asked.[5] And this rule applies to actions of ejectment.[6] It must now be considered the settled rule in this state, although there are some decisions to the contrary, that where the answer in an action at law sets up not only an equitable defense, but prays for affirmative equitable relief, the case becomes an equitable suit, and is governed by the rules of procedure applicable to suits in equity.[7] Thus where, in an action of ejectment, defendant admits plaintiff's right to the possession, but interposes an equitable defense to the action and demands affirmative relief, the case is converted into an equitable one.[8] And it seems that if the answer

[1] Bond v. Worley, 26 Mo. 253; Blanke v. St. Louis-Sonora Mining Co., 35 App. 186.

[2] Walton v. Walton, 17 Mo. 376.

[3] 20 Mo. 222.

[4] McCollum v. Boughton, 132 Mo. 601, 621.

[5] Kostuba v. Miller, 137 Mo. 161.

[6] Carter v. Prior, 8 App. 577, 78 Mo. 222; Kerstner v. Vorweg, 130 Mo. 196.

[7] Freeman v. Wilkerson, 50 Mo. 554; Estes v. Fry, 94 Mo. 266; Wendover v. Baker, 121 Mo. 273; McCollum v. Boughton, 132 Mo. 601.

[8] O'Day v. Conn, 131 Mo. 321; Schuster v. Schuster, 93 Mo. 438.

contains a cross-bill which interposes an equitable defense going to the entire claim of plaintiff, and it contains a prayer for relief which a court of equity alone can grant, the action becomes triable as one in equity.[1]

§ 10. If to an action at law an equitable defense is interposed which, if established, is a complete bar to plaintiff's legal action, the case necessarily possesses all the attributes and features of one in equity. Thus if, in an action of ejectment, the answer interposed equities which, if established, nullify the plaintiff's legal title and prevent a recovery by him, then the existence of those equities must be first determined, and determined unfavorably to the defendant, before the legal title can prevail.[2]

§ 11. It is an interesting question whether, in a case in which defendant has an equitable defense to an action at law and fails to present it, he can afterward make it the ground of an independent suit against the plaintiff. There is one case in which the supreme court holds that this cannot be done,[3] though the decision on that point was by a bare majority of the court. And in a subsequent case, in which all the judges concurred, the above decision was cited with approval.[4]

§ **12. Cases illustrating the above principles.**— In an action at law brought against a railroad company to recover damages for the taking of plaintiff's land by the company, defendant, in addition to a general denial, interposed an equitable defense and cross-bill, the cross-bill containing a prayer that the plaintiff be required to specifically perform a contract to convey to defendant a right of way across plaintiff's land. The trial court treated the claim by plaintiff for damages and the cross-bill by defendant seeking a specific performance as two separate actions, and proceeded first to try the equitable suit raised by the cross-bill. Its finding was against the defendant on its cross-bill, and a decree was entered that said cross-bill be dismissed. It then tried the action for damages before a jury, and upon a demurrer to the evidence being sustained plaintiff took a nonsuit. Afterwards plaintiff instituted another action for damages for the ap-

[1] Seaboard National Bank v. Woesten, 68 App. 137. This case is an action on a special tax bill.

[2] Allen v. Logan, 96 Mo. 591. In that case the defendant prayed for affirmative relief, but I do not see any reason why the same rule should not apply in a case where affirmative relief is not asked, if the equitable defense completely nullifies the plaintiff's legal cause of action.

[3] Kelly v. Hurt, 74 Mo. 561.

[4] Bobb v. Graham, 89 Mo. 200, 209.

propriation of the same land, and at the trial tendered defendant a deed for the right of way. The jury rendered a verdict awarding plaintiff substantial damages. It was held that the separate trials were proper, and that the decree against the defendant on its cross-bill settled forever and completely the rights and liabilities of the parties under the agreement set up in such cross-bill; and further, that the decree so had in the equity part of the case was not disturbed by the subsequent nonsuit in the action at law. The court therefore refused to disturb the verdict in plaintiff's favor.[1]

§ 13. In the case of *Wynn v. Cory*[2] the petition combined an action in ejectment with a suit in equity for the cancellation of a deed. The trial proceeded in all respects as that of a suit in equity, special issues being framed for the jury, both in relation to the question of defendant's notice of plaintiff's title and also in relation to the amount of damages, and separate juries passed upon these two points. The judgment was for possession, with damages and costs, as in an ejectment suit. It was held that this judgment could not be allowed to stand; that either the chancery branch of the case should have been rejected as surplusage, and a trial and judgment had as in an action at law, or the law branch of the case should have been rejected and a trial and judgment had in accordance with the practice in equity.

[1] McReynolds v. Kansas City, C. & S. R. Co., 34 App. 582.

[2] 43 Mo. 301.

## CHAPTER II.

### AVOIDING CIRCUITY OF ACTION.


§ 15. Settling all rights in one proceeding.
17. The early decisions on this point.
19. Legal and equitable causes must be separately stated.
22. Decisions illustrating the rule.
24. Release procured by fraud.
§ 25. Alternative relief will not be granted.
26. The rule applied to defenses.
27. Mistake.
28. Affirmative relief.
29. A case enforcing the above rules.
30. Remedy of one defendant against another.


**§ 15. Settling all rights in one proceeding.**—Among the more important reforms sought to be introduced by the practice act is that of obviating circuity of action by permitting parties in one and the same action to adjust and determine all their respective rights and claims connected with and growing out of the subject-matter of the action.[1] Mr. Pomeroy, in his work on Remedies, well says that the new system not only permits, but encourages, the notion that all possible disputes or controversies arising out of, or connected with, the same subject-matter or transaction should be settled in a single judicial action. I think it would not be going too far to say that the spirit of the system requires this.[2]

§ 16. How widely different this is from the notions which obtained before the introduction of the new system is apparent. It is needless to enlarge upon the sharp distinction which, under the former practice, existed between proceedings at law and those in equity. The subject is a familiar one to every student of the law. Where one possessed equitable rights which, upon being enforced, would open up to him certain legal rights, he could under no circumstances avail himself of the two classes of rights in the same proceeding. If, when sued at law, he was without any defense which a court at law would recognize, but was able to show that it would be inequitable and unconscion-

[1] Deitz v. Leete, 28 App. 540.

[2] Lord Brougham, in his speech upon the reform of the law, lays down this just rule: "No one should be sent to two courts, where one is able to afford him his whole remedy, nor should any one be obliged to come twice over to the same court for different portions of his remedy, which he might have all in one proceeding."

able for plaintiff to enforce his legal rights, he would nevertheless not be permitted to set up this fact as a defense to the action at law, but must go into a court of equity and there stay the proceedings at law until his equitable rights could be so declared as to enable him to interpose them as a defense to the legal action. If a system has been devised and put into operation under which this circuity of proceeding can be avoided, so that all questions arising out of the cause at issue can be settled in one proceeding instead of subjecting the parties to the delay, expense and annoyance of two proceedings, it should be eagerly accepted by the courts and the profession. Such a system is not only possible, but it is furnished in the code of practice. Yet, strange to say, courts have shown no little unwillingness to reap the full advantage of this change; and it has only been by slow and gradual steps that they have adopted the new system in its completeness. Even at the present day there is manifest a hesitancy and almost a fear to avail of all its benefits in this respect, in which is to be found, if not the most important reform, at all events one that is far reaching in its beneficial results.

**§ 17. The early decisions on this point.**— It was held in 1855 that, in an action which involved the legal title only, the court could not correct a mistake in the description in a deed and then give effect to the deed as amended.[1] And that case has been cited with approval in two quite recent decisions.[2] But in the *Evans* case[1] the petition was simply one in ejectment, and no attempt was made to set out any ground for equitable relief. Therefore all that these three cases decide is that, unless the mistake in the description is one which may be disregarded, it cannot be corrected, where the petition is not framed on that theory.

§ 18. In an early case it was held that a petition in which it was attempted to vacate a title, and at the same time to vest that title in the plaintiff and to eject the defendant, was fatally erroneous, and that advantage might be taken of the defect even on writ of error or on appeal.[3] But it is probable that the court intended in that case to hold only that this could not be done in a single count; for, in the opinion, it is said that, "in those cases where it is permissible under the Code to combine in the same proceeding or petition legal and equitable claims, the matter in equity and the action at law must be separately stated and must

[1] Evans v. Greene, 21 Mo. 170, 208.
[2] West v. Bretelle, 115 Mo. 653, 659; Presnell v. Headley, 141 Mo. 187, 191.
[3] Magwire v. Tyler, 47 Mo. 115.

necessarily be separately tried. Each count must be tried by itself according to the prescribed mode in such actions and suits. In an action at law there is a constitutional right of trial by jury, which has no existence in equity." (p. 127.) In fact this is the ruling which was made in the earlier case of *Peyton v. Rose*,[1] where it is said: "If an action at law and a cause of action belonging to equitable jurisdiction can properly be united in the same petition, under either of the classes of claims mentioned in the practice act, they must still be separately stated, and must necessarily have a separate trial, inasmuch as the mode of trial and the rules of proceeding are essentially different, and the judgments must be different." (p. 262.) And it was therefore held in that case that a bill to set aside a deed, and to recover the possession of the land embraced in the deed, would not lie. *Janney v. Spedden*[2] is cited as an authority. But it will be noticed that in the case cited the ground set up for equitable interference was not sustained by the evidence, and the court held that a bill in equity could not be maintained merely for the purpose of obtaining possession, which was all that the evidence did support. The question again came before the supreme court in 1872, in *Henderson v. Dickey*,[3] when the court declined to follow *Peyton v. Rose*,[1] saying: "It is improper to mingle a cause which is purely equitable with one which is strictly legal in the same count in a petition, and to proceed to try them together before a chancellor; but it does not thence follow that in all cases a party must first get his decree for title, and then bring a separate and independent action in ejectment to obtain possession." (p. 165.) And the court adds that the fault in *Peyton v. Rose* was that the cause of action at law and the bill in equity were united in the same count.

§ 19. **Legal and equitable causes must be separately stated.** It thus became the settled law that when legal and equitable causes are combined they must be separately stated; and if they are not, the judgment rendered will be reversed by the appellate court. Where the petition combined an action in ejectment with a suit for the cancellation of a deed, and the trial proceeded as a suit in equity, special issues being framed for a jury, both in relation to the question of defendant's notice of plaintiff's title and also in relation to the amount of plaintiff's damages, separate juries passing upon each of these points, a judgment for possession with damages and costs, as in a plain ejectment suit,

[1] 41 Mo. 257. [2] 38 Mo. 395. [3] 50 Mo. 161.

was set aside by the supreme court.[1] It may also now be considered settled that in all cases a plaintiff may in one proceeding enforce all the rights he has as to any subject-matter, though a part of the rights are legal and a part are equitable in their nature, if they are separately set forth. A court of equity may grant equitable relief by divesting title out of the defendant and vesting it in the plaintiff, and may then award plaintiff a writ of possession; its powers are adequate to do full and complete justice in such a case, and plaintiff will not be compelled to resort to an action of ejectment.[2] And, on the other hand, where a deed is executed under a power, but under such circumstances as to constitute a fraudulent exercise of the power, it may be assailed by an action of ejectment against the grantee, without first resorting to a court of equity to set it aside.[3]

§ 20. Where the petition contains a count praying for equitable relief, plaintiff may in another count ask for the statutory foreclosure of a mortgage.[4] Where an action is brought against husband and wife on a promissory note executed by both, plaintiff may at the same time pray that the separate property of the wife be subjected to sale for the payment of the note.[5] But where the separate estate of the wife is involved, the courts manifest a disposition to proceed conservatively. Thus, in a recent case, defendant, being the owner of forty acres of land on which there was a deed of trust for $1,200, sold it to Nichols, who was at the time indebted to plaintiff, and against whom plaintiff recovered judgment in the circuit court. The deed, a general warranty, was made to the wife of Nichols and put of record before plaintiff's judgment. Afterward defendant bought the land at the trustee's sale and went into possession, but before this sale the sheriff had levied on the land under plaintiff's judgment and sold it to plaintiff, who brought ejectment against defendant alone, on the ground that the deed to the wife of Nichols was fraudulent as to creditors and void. It was held that, in an action of ejectment, the legal title could not be divested out of Mrs. Nichols and vested in plaintiff, but that this could be done only by showing his equitable right.[6]

§ 21. Where a proceeding is brought for the admeasurement

[1] Wynn v. Cory, 43 Mo. 301.

[2] Woodsworth v. Tanner, 94 Mo. 124.

[3] Scheidt v. Crecelius, 94 Mo. 322. Consult also chapter I. .

[4] Burnside v. Wayman, 49 Mo. 356. That in an action for nuisance or for a trespass there may a be prayer for an injunction, see § 23, notes 3 and 4.

[5] Lincoln v. Rowe, 51 Mo. 571.

[6] Kingman v. Sievers, 143 Mo. 519.

of dower in land which is in the possession of defendant, the court may assign the dower, and in the same proceeding decree possession of the land to the various parties in accordance with the assignment.[1]

§ 22. **Further illustrations.**— In 1858 it was held that partition would not lie against one in possession of land asserting an exclusive title thereto, but that the party out of possession must first bring his action of ejectment to try his title.[2] And the same view seems to have been entertained as late as 1897.[3] But it is only where the defendant is in adverse possession of the entire premises, claiming an absolute title thereto adversely to any co-tenant, that a co-tenant will be driven to an action of ejectment before he can maintain partition.[4] A bill to correct a deed procured by fraud, and also for partition of the land, is not bad for misjoinder.[5] A court of equity may enforce a trust between tenants in common and at the same time make partition and take an account of the rents and of the improvements made, or of moneys paid out for the common benefit. And if one of the joint owners appears to have received more than his share, a court of equity will direct an accounting, and will not confine itself to a mere decree of partition.[6] In a proceeding to enforce the specific performance of a contract to convey land, the petition may include a prayer that defendant be compelled to account for the rents and profits of the land.[7]

§ 23. It is proper to unite with a cause of action in ejectment a count in equity praying that certain deeds, under which the defendant claims, be set aside.[8] One may maintain an action of ejectment though his title is based upon lost deeds, and will not be compelled first to resort to equity to establish the deeds and their loss.[9] Where one who holds a life estate, with power to sell in case of necessity, makes a deed, the remaindermen may, by an action in ejectment, attack the deed upon the ground that the necessity to sell did not exist, and that the sale was an abuse of the power, and it is not necessary that they shall first resort to equity to have the deed set aside.[10] Where an action is brought

[1] Honaker v. Shough, 55 Mo. 472.
[2] Lambert v. Blumenthal, 26 Mo. 471; Gott v. Powell, 41 Mo. 416.
[3] Hutson v. Hutson, 139 Mo. 229; Estes v. Nell, 140 Mo. 639.
[4] Holloway v. Holloway, 97 Mo. 628.
[5] Dameron v. Jamison, 4 App. 299.
[6] Rozier v. Griffith, 31 Mo. 171.
[7] Duvall v. Tinsley, 54 Mo. 93.
[8] Morrison v. Herrington, 120 Mo. 665.
[9] Donaldson v. Williams, 50 Mo. 407.
[10] Scheidt v. Crecelius, 94 Mo. 322.

for the price of a machine, the court may properly make the original purchaser and his vendee parties defendant, and in the suit settle the plaintiff's right to levy execution on the machine.[1] A bill in equity to reform a policy of insurance may properly be joined with an action at law for recovery upon the reformed policy.[2] In an action for damages for the maintenance of a nuisance, plaintiff may properly unite a prayer for an injunction with that for damages;[3] so also in an action for trespass, he may properly embrace a prayer for an injunction.[4]

§ 24. **Release procured by fraud.**— Where a release of a cause of action has been procured by fraud, and the party injured desires to bring his action, he is not compelled to file a separate bill in equity in order to have the release set aside before bringing the action, but may by a separate count in his petition ask to have the release set aside on the ground of fraud in its procurement.[5] And the weight of authority, as shown by the above cases, is that he may, if the release is set up in the answer as a defense, impeach it for fraud by his reply.[6] The rule that a count in equity to set aside a release of damages for personal injuries may be joined with one at law for a recovery of the damages applies to actions based upon personal injuries.[7]

§ 25. **Alternative relief will not be granted.**— Though the courts have shown a praiseworthy desire to avoid unnecessary circuity of action, they have not gone so far as to permit a party to seek alternative relief, or, in other words, to ask that if plaintiff should have mistaken his remedy and should fail to obtain the relief he prays for, another and different cause of action may be tried, and a different relief awarded.[8] If a suit is brought to enforce a trust with reference to specific property, and plaintiff prays a divestiture of the title, and then asks that if the court should refuse this prayer it would proceed to ascertain the respective rights of the plaintiff and defendant, and decree a par-

[1] Steam Stonecutter Co. v. Myers, 64 App. 527.

[2] McHoney v. German Ins. Co., 44 App. 426.

[3] Paddock v. Somes, 102 Mo. 226; Whipple v. McIntyre, 69 App. 397.

[4] Ware v. Johnson, 55 Mo. 500.

[5] Girard v. St. Louis Car Wheel Co., 46 App. 79; Homuth v. Metropolitan Street Ry. Co., 129 Mo. 629; Courtney v. Blackwell, 150 Mo. 245.

[6] This he may now do by an express provision of the statute. Rev. Stat. 1899, sec. 654.

[7] Blair v. Chicago & Alton R. Co., 89 Mo. 383; Och v. Missouri, K. & T. R. Co., 130 Mo. 27; Hancock v. Blackwell, 139 Mo. 440.

[8] Robinson v. Rice, 20 Mo. 229; Pensenneau v. Pensenneau, 22 Mo. 27.

tition and division, such latter relief will not be granted.[1] So, too, in an action of replevin plaintiff cannot ask that, if he is defeated in his claim to the property, he may recover on a warranty of the title.[2]

§ 26. **The rule applied to defenses.**— It is not alone the plaintiff who is permitted to enforce both legal and equitable rights in the same proceeding. The defendant also comes within the rule, and he may set up a defense which is equitable in its nature, either by itself or in connection with a purely legal defense; and that, too, whether the cause of action is one at law or in equity. This point has been so fully discussed in the chapter on Legal and Equitable Proceedings[3] that it is necessary to add but little here. As an instance showing the extent to which the rule is carried, it has been held that where four successive actions in ejectment have been brought for the same premises, all based upon the same facts, it is proper for defendant in his answer to the last action to join a count in equity, in the nature of a bill of peace.[4]

§ 27. **Mistake.**— Our courts now recognize the right of a defendant in an action at law to set up as an equitable defense a mistake in the instrument which is the basis of the action; and such defense, if proved, will defeat the action, whether or not affirmative relief is asked. Thus in *Barlow v. Elliott*,[5] which was an action for breach of covenants in a deed, the petition alleged that the land described in the deed was incumbered by a deed of trust; defendant, in addition to a general denial, interposed the equitable defense that the grantee and covenantee agreed to assume and pay off this incumbrance, but by mistake or oversight of the scrivener this agreement was not set out in the deed. It was held that evidence of this fact was admissible, and that if the fact were proved it was a complete defense to the action, though defendant did not pray that the deed be reformed.

§ 28. **Affirmative relief.**—Where defendant in ejectment has an equitable defense which entitles him to affirmative relief, he may set it up in the action of ejectment. He is not bound to first try his title at law and, if defeated there, then file a bill to

[1] Pensenneau v. Pensenneau, 22 Mo. 27.

[2] Robinson v. Rice, 20 Mo. 229.

[3] See § 8 *et seq.*, *ante*.

[4] Potter v. Adams, 143 Mo. 665. A proceeding to set aside a release may be joined with a cause of action or a defense. See also § 24, *ante*, and § 765, *post*.

[5] 56 App. 374.

enjoin the execution.[1] It being the settled law in this state that the defendant in an action of ejectment may by answer interpose an equitable defense and have his equities tried and determined in that action, without having to resort to an independent suit in equity, it logically follows that affirmative relief may be given to the defendant upon his answer in all such cases where from the nature of the subject-matter and the relations of the parties a specific remedy in his favor is possible according to the doctrine of equity jurisprudence. And such is the holding of our courts.[2] If defendant interposes the defense that the trustee's deed under which plaintiff claims was void, because the notice of sale required by the deed of trust was not given, plaintiff may in his reply ask for a judgment of foreclosure and a sale, and a decree may properly be rendered to that effect.[3]

**§ 29. A case enforcing the above rules.**—A case which strikingly illustrates the difference between the practice under the Code, and that which formerly prevailed, is that of *Martin v. Turnbaugh*,[4] in which Marshall, J., in his usual lucid manner, explains the effect of the change in method of procedure. The case was one in ejectment. Defendant set up certain equitable defenses and prayed for equitable relief. Plaintiff in his reply alleged facts which constituted an equitable defense to the allegations of the answer. The trial court tried the cause as one in equity, received the defendant's evidence in support of his equitable defenses, but rejected the evidence offered by plaintiff to establish the averments of his reply. The supreme court held that this was error. The following is the language of Judge Marshall: "This case is a strong illustration of the difference between proceedings at common law and under our code. It is a plain suit in ejectment. When it was begun, the title was in the plaintiffs, and the defendant was in possession without any right of record. But by his answer the defendant asks the court, on its chancery side, to raise up or restore an equitable right to the possession, by canceling the entry of satisfaction of the deeds of trust and reinstating them. Unless and until the court does so, which it can only do after a trial, the defendant has shown no defense to the plaintiffs' right to the possession of the land. At common law the defendant could not have interposed such a de-

[1] St. Louis v. Schulenburg & Boeckler Lumber Co., 98 Mo. 613.

[2] Swope v. Weller, 119 Mo. 556. See also Sampson v. Mitchell, 125 Mo. 217.

[3] White v. Rush, 58 Mo. 105.

[4] 153 Mo. 172.

fense or asked such relief in the ejectment suit. The defendant would have been compelled to ask the aid of a court of equity, and the proceedings in the ejectment suit would have been stayed until the determination of the equity suit. When the defendant went into a court of equity and asked to have the entry of satisfaction annulled and the deeds of trust reinstated, the plaintiff could have defended on the grounds stated in his reply; that is, that the defendant had lost his right to have the relief asked because of his fraud, by virtue of the merger, or by reason of the payment of the debt secured by the deeds of trust. If the plaintiffs herein (who would, of course, be the defendants in such a suit in equity) established any of these defenses, the defendant herein (the plaintiff in such an equity suit) would be denied the relief sought, the equity suit would be ended, and the defendant would have no further defense in the ejectment suit, and hence the judgment would be for the plaintiffs." After stating the course which such a suit in equity would take, the learned judge proceeds:

"It was the very purpose of the Code, when the common law and equity powers were centered in the same court, to abolish this circumlocution, and hence the petition may now have a count at law and a count in equity (Rev. Stat. 1889, sec. 2040),[1] the answer may contain a legal defense, an equitable defense and an equitable cross-bill or counter-claim (Rev. Stat. 1889, sec. 2050),[2] and the reply may set up legal or equitable defenses to the new matter set up in the answer (Rev. Stat. 1889, sec. 2052).[3] The object of all which is to simplify proceedings, and to settle the whole controversy between the parties in the one action. If the action is one at law, and the answer seeks affirmative equitable relief, or pleads a legal defense, and the reply raises an equitable defense to the affirmative legal defense set up in the answer, the equitable claim or defense must be tried by the court, sitting in equity, before the action at law can be tried; and this is the statutory substitute for the relief formerly afforded by courts of law and courts of equity collectively. In this case the court has stayed the plaintiffs' suit at law while it heard defendant's cross-action in equity, but it has refused to hear the plaintiffs' defense to the defendant's cross-action in equity, and thus it has granted defendant the equitable relief he asked and denied the plaintiffs the right to defend in equity against the defendant's equitable claim, and also denied the plaintiffs the relief at law they asked. . . . The error of the trial court was in not dealing with

[1] Rev. Stat. 1899, sec. 593. [2] Rev. Stat. 1899, sec. 605. [3] Rev. Stat. 1899, sec. 607.

the whole controversy when it tried the case as one in equity. If it was a case in equity so far as the defendant was concerned, it was the duty of the court, in trying defendant's claim in equity, to hear and determine all the equitable defenses which a court of equity would or could hear if it had been an original proceeding by Estes to have his entry of satisfaction annulled and his deeds of trust reinstated. In other words, the court did equity for Estes but refused to do it for Martin, and told him to go into a court of equity to get relief, notwithstanding he was already in a court of equity. This is more circumlocution than existed before the adoption of the Code." (p. 185.)

§ **30. Remedy of one defendant against another.**— One of the most important questions in this connection is that of the right of one defendant to obtain relief against another defendant, so that the rights of all parties may be completely adjudicated in the same proceeding. Section 767[1] provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; that the judgment may determine the ultimate rights of the parties on each side as between themselves, and that it may grant to the defendant any affirmative relief to which he may be entitled. In a very recent decision of the supreme court it is held that neither the above section, nor any other provision of the Missouri Code, authorizes a counter-claim or an equitable cross-action by one defendant against another, except as one defendant may be entitled to such relief against another as will enable him to make good his defense to the plaintiff's suit. Whatever affirmative relief one defendant may have as against another must be of a character responsive to the plaintiff's suit. The court says further that section 767[1] does not authorize one defendant to inject into the plaintiff's suit an independent suit either at law or in equity against his co-defendant, if it is not necessary or germane to his defense to the plaintiff's suit, and the relief that may be granted to one defendant against another is only such as is incidental to his defense. Moreover, if the plaintiff is not entitled to any relief as against either defendant touching the subject-matter in dispute, one defendant cannot have relief against his co-defendant touching the same subject.[2]

§ 31. In that case plaintiff filed his bill in equity to establish a resulting trust in land held by defendant G. under a claim of

[1] Rev. Stat. 1899.

[2] Joyce v. Growney, 154 Mo. 253.

ownership, but which plaintiff claimed defendant G. had acquired from defendant J. by fraudulent acts and by threats. At the trial, and after the evidence was all in, defendant J. was permitted to file an amended answer, in which he asserted title in himself to a part of the land, and alleged that the deeds to his co-defendant were without consideration, and his answer concluded with a prayer that the deeds to the co-defendant be canceled, and for such further relief as equity and good conscience might require.[1] Plaintiff failed to make out a case entitling him to equitable relief, but the court granted the prayer of defendant J. against defendant G., and entered a decree accordingly. This the supreme court held to be erroneous, and it reversed the judgment with directions to the court below to dismiss the plaintiff's bill. This decision apparently turns upon the fact that plaintiff was not entitled to any relief as against either defendant, and that therefore the decree as between the two defendants had nothing to rest on. For the court does not intimate that the earlier case of *Hicks v. Jackson*[2] is overruled. Yet it is difficult to find in this earlier case any announcement of the doctrine that one defendant cannot maintain an equitable cross-action against another defendant "except as one defendant may be entitled to such relief against another as will enable him to make good his defense to the plaintiff's suit." The point decided, and apparently the only point decided, in the *Hicks* case[2] is that the two defendants, between whom the question of relief is raised, must be both of them necessary parties to a complete determination of the plaintiff's cause of action; not that they must be necessary parties to a recovery by plaintiff, but that the cause of action which is the foundation of plaintiff's suit cannot be finally and fully determined as to one of the defendants without settling his rights as against another party. And if such other party is not made a defendant by the plaintiff, the one who is made a defendant may cause the other to be brought in and made a co-defendant, in order that the rights as between them may be litigated.[3] Since this is the effect of the decision in the *Hicks* case,[2] and since the *Joyce* case[4] does not purport to over-

[1] The fact possesses some significance that this amended answer directly contradicted the same defendant's former answer.

[2] 85 Mo. 283.

[3] And it seems that the cause cannot be dismissed as to the party who is brought in as a co-defendant for this purpose, at least not without his consent. Browning v. Chrisman, 30 Mo. 353.

[4] Joyce v. Growney, 154 Mo. 253.

rule it, then the scope of the decision in the *Joyce* case must be that which is indicated above. The language of the court in the *Hicks* case would seem to be unmistakable. Judge Ray says: "It will not be pretended that the defendant, who shows himself entitled to affirmative relief against his co-defendant, is not to be treated and regarded as against him as a plaintiff to that extent and for that purpose."[1]

§ 32. The conclusion reached by the supreme court in the *Joyce* case[2] was correct under the circumstances and the peculiar facts of that case. In the first place, there is authority for the doctrine that if the plaintiff's suit is dismissed the cross-bill must fall with it; and there can be no question that in the case under discussion the plaintiff's bill was properly dismissed. In the second place, the trial court had abused its discretion in allowing defendant J. to file an amended answer containing the cross-bill after all the evidence was in, especially in view of the contradictory answers which had previously been filed by him. And for that reason alone the decree in his favor was properly reversed. But with all due respect for the high character of the judge who rendered the decision, I cannot but think that the *dicta* contained in the opinion confine within too narrow limits the office of a cross-bill or cross-complaint under the Code; and that the *Hicks* case[3] more nearly announces the true rule. It is undoubtedly true that one defendant cannot inject into a cause an independent cause of action against a co-defendant. If, for instance, plaintiff sues to cancel a deed which has been obtained through the fraud of the grantee and his co-defendant, and it happens that one of the defendants holds a matured promissory note executed by the other, he certainly cannot in his answer set up a cause of action on that note and recover on it against his co-defendant. But this is a far different matter from allowing the defendant to set up against his co-defendant a claim growing out of the subject-matter of plaintiff's cause of action. This was always permitted by courts of equity, not only for the purpose of making a defense, or aiding the defense, against the claim of plaintiff, but also for the purpose of obtaining affirmative relief as between the defendants themselves.[4] It should, therefore, necessarily

[1] 85 Mo. 294.

[2] Joyce v. Growney, 154 Mo. 253.

[3] 85 Mo. 283.

[4] Story, Eq. Pldg. (10th ed.), sec. 392; Pattison v. Hull, 9 Cowen, 747; Wright v. Miller, 1 Sandf. Ch. 103; Vandeveer v. Holcomb, 17 N. J. Eq. 87; Ayers v. Carver, 17 How. (U. S.) 591 [15 Co-op. Ed., p. 179].

and logically be permitted under the code practice. The supreme court of Indiana, in considering a section of the Indiana statute similar in its terms to section 767[1] of our own statute, says: "The mode of procedure is not pointed out by the statute, and as the authority given is one previously possessed only by courts of chancery, we suppose the rules of pleading and practice of those courts, modified by the spirit of the Code, must be resorted to."[2]

§ 33. But the case of *Hicks v. Jackson*[3] is not the only case in which this question had previously come before our courts. *Tucker v. St. Louis Life Ins. Co.*[4] was a suit for the foreclosure of a first mortgage, and the holders of the second and third mortgages were made parties. The holders of the third mortgage alleged in their answer that the second mortgage was fraudulent, and the answer contained a prayer that the third mortgagees be preferred to the second mortgagees in the distribution of the proceeds of the mortgage sale. There is no intimation, either on the part of the various counsel or on the part of the court, that such a cross-bill as between the defendants was improper. Yet the supreme court distinctly recognizes the fact that the relief sought by the third mortgagees was not necessary to their defense as against the plaintiff, nor, so far as is apparent from the facts stated, did it have anything to do with the defense of either defendant. It will be noticed that Judge Sherwood says, when referring to the practice in courts of equity, that "in those courts, when one defendant sought relief against a co-defendant *as to matters dehors the original bill*, it became necessary for him to file a cross-bill and have process to bring such defendant in."[5] And the learned judge, while deciding that such course was not necessary under the Code, yet clearly asserts the right of the defendant to file such a cross-bill, and says "that it has *always* been customary to afford ample time to the co-defendant to answer as to the relief sought — a time which is generally fixed by the court's order to that effect." (p. 595.) This recognition of the custom in courts of equity to grant relief as between defendants in matters which grow out of the subject-matter of plaintiff's cause of action possesses almost equal authority with a direct decision on the point, since what is

[1] Rev. Stat. 1899.
[2] Kemp v. Mitchell, 36 Ind. 249, 256.
[3] 85 Mo. 283.
[4] 63 Mo. 588.
[5] 63 Mo. 595.

stated in the opinion is not a mere *dictum*, but is necessary to the decision of the question whether the court improperly refused to set aside a default as to the co-defendants. And this is especially true in view of the fact that the court held that, even if the court below properly refused to set aside the default as to the plaintiffs, it should have set aside the default as between the co-defendants, so that the co defendant against whom the cross-bill was filed might have had an opportunity to answer to such cross-bill.

## CHAPTER III.

### GENERAL RULES GOVERNING PLEADING.


§ 34. The purpose of the Code.
35. How issues are raised.
36. Only one pleading at a time.
37. The test of sufficiency.
38. Averments must be certain.
39. Averments must be consistent.
40. Pleading and proof.
41. Signing pleadings.
42. Verification of pleadings.
43. Verification of interplea.
44. Verification in divorce cases.
45. Time for pleading.
47. When defendant must plead.
48. Same — Cross-bill by one defendant against another.
49. When plaintiff must reply.
50. Filing pleadings out of time.
51. Same — Demurrer or reply.
52. Filing reply at trial.
53. Treating reply as filed.
54. When leave is granted to file a pleading of one character, a pleading of another character should not be substituted.
55. Substituting one pleading for another.
56. Taking default.
57. Setting aside default.
58. Lost pleadings.


**§ 34. The purpose of the Code.**— The intention of the practice act was to make all pleadings special, and to abolish general averments stating conclusions of law; it was meant that the pleadings should be a statement of the facts of the case on both sides.[1] Yet in the very opinion in which the court of appeals lays down this unquestionably correct rule,[2] that court holds that a petition for money had and received was not good because it failed to aver a promise by plaintiff to pay the money. In an implied contract the promise, *ex vi termini*, is implied from the facts: i. e., it is a conclusion of law from the facts stated. Under the common law it was never pretended that the allegation of the promise was an allegation of an actually existing fact. Yet our courts, while repeatedly declaring that the pleadings must state facts and not conclusions of law, require that in the so-called action of *assumpsit* it must be averred that plaintiff "promised."[3] The reasoning of the Kansas City court of appeals, in holding this to be unnecessary,[4] appears to be incontrovertible.[5]

[1] Gamage v. Bushell, 1 App. 416, 418; Kerr v. Simmons, 82 Mo. 269, 275.

[2] Gamage v. Bushell, 1 App. 416.

[3] Cape Girardeau & S. L. R. Co. v. Kimmel, 58 Mo. 83, 85, where the opinion contain an express admission that the promise is a conclusion of law, but nevertheless holds that it must be pleaded as a fact.

[4] Kansas City Nat. Bank v. Landis, 34 App. 433.

[5] The subject is discussed more at length in § 343, *post*.

**§ 35. How issues are raised.**— An issue arises upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds: first, of law; and second, of fact. An issue of law arises, first, upon a demurrer to the petition, answer or reply, or to some part thereof; or, second, upon an allegation of fact in a pleading by one party, the truth of which is not controverted by the other. An issue of fact arises, first, upon a material allegation in the petition controverted by the answer; or, second, upon new matter in the answer controverted by the reply; or, third, upon new matter in the reply, unless an issue of law is joined on such new matter. Issues both of law and fact may arise upon different parts of the pleadings in the same action, in which case the issues of law must be first tried, unless the court directs otherwise.[1] The issues must be raised by the pleadings, and cannot be enlarged by the evidence or the instructions or by both combined.[2] Much less can evidence be introduced to overthrow the issue as made by the pleading of the party who seeks to introduce it.[3] Where parties have made up their issues by their pleadings and gone to trial, the issues can be changed only by amending the pleadings on terms.[4]

**§ 36. Only one pleading at a time.**— Several pleadings cannot be applied to the same part of a pleading at the same time.[5]

**§ 37. The test of sufficiency.**—The sufficiency of the pleadings, except where it is otherwise specially provided by the statute, is to be measured by the practice act, and trips or false steps, which under the former practice would have been fatal, are no longer matters of moment.[6]

[1] Rev. Stat. 1899, secs. 677–680; State ex rel. v. St. Louis Circuit Court, 41 Mo. 574, 579.

[2] Christian v. Connecticut Mut. L. Ins. Co., 143 Mo. 460, 469.

[3] Capital Bank v. Armstrong, 62 Mo. 59, 66.

[4] Mays v. Pryce, 95 Mo. 603.

[5] Rev. Stat. 1899, sec. 625; Taber v. Wilson, 34 App. 89; Long v. Towl, 41 Mo. 398.

[6] Rev. Stat. 1899, sec. 591; Elfrank v. Seiler, 54 Mo. 134, 136. Yet, notwithstanding this broad statement of principle, we find in an opinion of the supreme court the statement that the Code is not sufficiently comprehensive to embrace every varied phase which the case may assume before reaching a judicial determination, and therefore resort must be frequently had to common-law methods of procedure, not only in equitable proceedings, but in ordinary actions at law. Tucker v. St. Louis Life Ins. Co., 63 Mo. 588, 594. But in a subsequent decision this remark is limited in its application to instances where it is sought to open a judgment by default. Neenan v. St. Joseph, 126 Mo. 89, 93.

§ 38. **Averments must be certain.**—The Code calls for a plain and concise statement of facts.[1] Vagueness and uncertainty are contrary both to its spirit and letter.[2] As is said by the supreme court of Wisconsin, no warrant can be found in the authorities for the position that where the objection is seasonably made, as where the petition is challenged by demurrer, such petition may be uncertain and ambulatory, now presenting one phase to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity, as he is pleased to name it and the necessities of argument require, and, if discovered to be good in any of the turns or phases which it may be thus made to assume, that it must be upheld in that aspect as a proper and sufficient pleading.[3]

§ 39. **Averments must be consistent.**—The averments of a pleading must be consistent with each other.[4] Where in an action to recover damages for personal injuries the petition contained an allegation that plaintiff, while in the service of a railroad company, proceeded to uncouple a car, and that some one unknown to him caused the cars to be moved without notice to him, whereby he was injured; and then contained the further allegation that the failure of the company to have a proper system and proper rules regarding such matters was the direct cause of the cars being moved without notice to him, the two allegations are so inconsistent that they cannot stand together. Plaintiff alleged that he did not know who caused the train to move, from which it necessarily follows that he did not know why and how it was moved. If he did not know these facts, he cannot affirm that the movement was the result of the failure to establish rules.[4]

§ 40. **Pleading and proof.**— One of the most important rules of pleading is that the allegations must be such as will be supported by the proofs; or, as it is generally expressed, the *allegata* and the *probata* must correspond. As this subject is fully treated in chapter V, the reader is referred to that chapter.

§ 41. **Signing pleadings.**— Section 619[5] provides that petitions and other pleadings and motions must be signed by the party or

[1] Rev. Stat. 1899, sec. 592.

[2] Rev. Stat. 1899, sec. 612. The requisites of good pleading in this regard are fully set forth in chapters IV, XIII and XXIII.

[3] Kewaunee County v. Decker, 30 Wis. 624.

[4] Rutledge v. Missouri Pac. R. Co., 110 Mo. 312. Consult also chapters IV, X, XIII and XXIII.

[5] Rev. Stat. 1899.

his attorney. But a failure to sign an answer cannot be regarded as a matter of substance; it is a defect which is cured by the statute of jeofails,[1] and does not render the judgment void.[2] That case decides further that there is no restriction as to the place of the signature, but that it may be at the top or in the body of the pleading as well as at the end.[2]

§ **42. Verification of pleadings.**— Where it is necessary to verify the pleading an omission of the *jurat* is not fatal, but the court may allow it to be attached *nunc pro tunc*.[3] A pleading of several parties may be verified by the affidavit of one of them.[4] And where the parties are husband and wife the affidavit of the husband alone is sufficient.[5] Where a bank is one of several interpleaders a verification by the cashier of the bank is a sufficient verification.[6] An interplea may be verified by the interpleader's attorney; and it is sufficient if it is sworn to to the best of the attorney's knowledge and belief.[7] Section 580[8] provides that if it is alleged in the petition under oath that there are persons interested in the subject-matter of the petition whose names he cannot insert because they are unknown, and he describes the interest of such persons and how it is derived so far as his knowledge extends, an order of publication may be issued as in case of non-residence. Section 9303[8] makes the practice in civil cases applicable, so far as practicable, in an action to collect delinquent taxes. In view of these statutory provisions it is held that if, in an action for delinquent taxes against unknown parties, the allegations as to the interest of such parties are not verified, the court acquires no jurisdiction, and the judgment rendered in such case is void.[9]

§ **43. Verification in case of interpleading.**— Where an order to interplead has been made, and the interplea is heard upon its merits, without any verification of the pleading by the party holding the fund, the question whether such verification is required becomes unimportant.[10] An interplea may be verified by

[1] Rev. Stat. 1899, sec. 672.
[2] Cochran v. Thomas, 131 Mo. 258.
[3] Bergesch v. Keevil, 19 Mo. 127.
[4] Ruch v. Jones, 33 Mo. 393.
[5] Huntington v. House, 22 Mo. 365.
[6] Scott-Force Hat Co. v. Hombs, 127 Mo. 392.
[7] Knapp v. Standley, 45 App. 264.
[8] Rev. Stat. 1899.
[9] Myers v. McRay, 114 Mo. 377.
The matter of denying under oath the execution of the instrument sued on is discussed under the answer. (Ch. XXV.)
[10] Merchants' Nat. Bank v. Richards, 6 App. 454.

the attorney of the interpleader to the best of his knowledge and belief.[1]

§ 44. **In divorce cases.**— The affidavit attached to a petition for divorce need not state the venue if the petition itself lays the venue in the proper county.[2]

§ 45. **Time for pleading.**— It has been held that the days given by the statute for filing pleas are days in which the court is in actual session, and that if the court adjourns over, the days on which it does not sit are not to be counted.[3] But the latter case cited in the note does not properly raise this question, since the ruling there related to the filing of a motion for a new trial, and it has been since overruled on that point.[4] The same principle is, however, recognized by the same court in *Carter v. Prior*,[5] and in *Allen v. Carter*,[6] but these cases are not reported in full, and upon an appeal of the first one to the supreme court the point is not considered.[7] It is well settled that Sunday is not to be counted as one of the days.[8] In the last case cited in the note it is said that, independent of and without the aid of any statute, the rule as to the filing of papers in a case is that, when the last day of the time limited for such filing falls on Sunday, the party has the whole of the next day in which to file them. And the supreme court says that Sunday is not counted in computing the time in which motions are to be filed in court or other steps taken therein of a similar nature in pending causes, as the law does not require either lawyers or judges to work on Sunday.[9]

§ 46. Holidays, on the other hand, even if they are to be considered as Sundays for all general purposes, are still to be counted in computing statute time unless expressly excepted.[10] There is no rule forbidding the performance of judicial duties on Christmas, or on any of the holidays mentioned in section 4683;[11] that section merely prohibits service of civil process on such days except in attachment cases in certain contingencies, and in injunction proceedings.[12]

[1] Knapp v. Standley, 45 App. 264.

[2] Burnes v. Burnes, 61 App. 612.

[3] Wash v. Randolph, 9 Mo. 142; Clerks' Savings Bank v. Thomas, 2 App. 367.

[4] See 3 Pattison's Digest, New Trial, 27, 28.

[5] 8 App. 577.

[6] 8 App. 585.

[7] See 78 Mo. 222.

[8] Miner v. Tilley, 54 App. 627; Diesing v. Reilly, 77 App. 450; Evans v. Chicago & Alton R. Co., 76 App. 468.

[9] State v. May, 142 Mo. 135.

[10] State v. Green, 66 Mo. 631.

[11] Rev. Stat. 1899.

[12] Diesing v. Reilly, 77 App. 450.

**§ 47. When defendant must plead.**— The statute requires that every defendant who is summoned or notified according to law shall demur to the petition or answer it on or before the third day of the term at which he is bound to appear, unless longer time is granted by the court.[1] The above section taken as a whole is most awkwardly worded and is unnecessarily prolix. This grows out of the fact that it is the result of successive amendments of the earliest statute on the subject, and that the amendments have been made by changes and additions instead of by entirely rewriting the section.[2] The defendant has all of the days prescribed by the statute, including the whole of the last day designated, in which to plead, if the term lasts so long.[3] If a party who has not been served with process appears voluntarily in the course of the term, he is entitled, after his appearance, to the number of days prescribed in the statute for the purpose of pleading.[4] The time for pleading is the same in attachment suits as in those commenced by ordinary process.[5]

**§ 48. Same — Cross-bill by one defendant against another.**— Where one defendant files a cross-bill against another, the latter is entitled to sufficient time to plead to the cross-bill, at least to as much time as would be allowed him to plead to a petition by the plaintiff.[6]

**§ 49. When plaintiff must reply.**— The time allowed plaintiff for demurring or replying to new matter in the answer is to be prescribed by rule or order of the court in which the cause is pending.[7] If the defendant files his answer before the expiration of the time limited by the statute for that purpose, the plaintiff is nevertheless bound to file his reply within the prescribed time after the answer is actually filed, and not after the time prescribed by the statute for the filing of the answer.[8]

**§ 50. Filing pleadings out of time.**— The statute provides that courts may for good cause and in furtherance of justice extend the time prescribed by the statute for filing any pleading or motion upon such terms as shall be just.[9] This leaves the time

[1] Rev. Stat. 1899, sec. 597.

[2] For the course of legislation on this subject consult Rev. Stat. 1855, p. 1230; Gen. Stat. 1865, p. 658; Rev. Stat. 1889, sec. 2042; Rev. Stat. 1899, sec. 597.

[3] Hart v. Walker, 31 Mo. 26; Brackett v. Brackett, 61 Mo. 221.

[4] Whiting v. Budd, 5 Mo. 443.

[5] Farrington v. McDonald, 28 Mo. 581.

[6] Tucker v. St. Louis Life Ins. Co., 63 Mo. 588.

[7] Rev. Stat. 1899, sec. 608.

[8] Beach v. Curle, 15 Mo. 105; Arnold v. Palmer, 23 Mo. 411.

[9] Rev. Stat. 1889, sec. 617.

within which pleadings must be filed to the sound judicial discretion of the trial court.[1] And in the absence of facts in the record showing that the trial court was guilty of gross abuse of its discretion, the appellate court will not interfere.[2] It has been well said by the supreme court that the purposes of justice are best subserved by allowing defendant to file his answer at any time before a default has been taken in all cases where he has a real defense to make, if such course will neither create delay nor prejudice the just rights of the plaintiff, especially where there is no reason to believe that the failure of defendant to answer was wilful or that he had any improper purpose in view.[3] In one case the supreme court reversed the judgment and remanded the cause because this was not allowed.[4] It is no abuse of the discretion of the trial court to permit an answer to be filed as late as nine days after the case is set for trial, where no default has been entered, and where defendant's affidavit shows a good cause for the delay.[5] On the other hand, it is not an unsound exercise of discretion to refuse leave to file an answer where defendant does not show that he has a meritorious defense.[6] In one case where plaintiff's counsel told the counsel of defendant that he might take all the time he pleased to file his pleading, it was held that the reasonable construction of such a permission was that defendant was to have all the time to plead that could be allowed consistently with the due and orderly progress of the cause to trial under the law and the rules of the court. Such a privilege cannot extend beyond the day on which the cause is actually called for trial.[7]

§ 51. **Same — Demurrer or reply.**— It is within the discretion of the trial court to allow defendant to file a demurrer after the time ordinarily fixed for the purpose has elapsed.[8] A reply may, by permission of the court, be filed at any time before trial.[9]

§ 52. **Filing reply at trial.**— Where the answer contains new matter, and no reply has been filed, and no action has been taken by the defendant for judgment on the new matter, it is invariably held that plaintiff may file a reply by way of general denial even at the trial;[10] especially if the failure to file the reply

[1] State to use v. Matlock, 82 Mo. 455.
[2] Austin v. Boyd, 28 App. 52.
[3] State v. Bird, 22 Mo. 470; Cooney v. Murdock, 54 Mo. 349.
[4] Judah v. Hogan, 67 Mo. 252. See also Cooney v. Murdock, 54 Mo. 349.
[5] State to use v. Matlock, 82 Mo. 455.
[6] Hallowell v. Page, 24 Mo. 590.
[7] Robyn v. Chronicle Pub. Co., 127 Mo. 385.
[8] Peak v. Laughlin, 49 Mo. 162.
[9] Rhine v. Montgomery, 50 Mo. 566.
[10] Ennis v. Hogan, 47 Mo. 513, and the other cases cited below.

is the result of accident or inadvertence.[1] He may file such reply after the jury is sworn and the pleadings have been read,[2] and even after the evidence on both sides is closed,[3] and even after verdict.[4] But after an appeal is taken the reply cannot be filed *nunc pro tunc*.[5] He may at the trial be permitted to file a reply to a counter-claim, even after defendant has asked an instruction that the counter-claim is confessed by a failure to reply to it.[6]

§ 53. **Treating reply as filed.**— If no notice is taken by either party of the fact that the reply has not been filed, but the cause is tried as if plaintiff had entered a general denial to the new matter in the answer, the courts will treat the case as though a reply by way of general denial had been duly filed; and it is too late after verdict for defendant to take advantage of the want of a reply.[7] By the very fact that defendant introduces evidence in support of the new matter pleaded in his answer, and submits such evidence to the jury by instruction, he waives whatever rights he might have in consequence of the lack of a reply.[8] And it is held that these rules apply not only to cases where the reply has been inadvertently omitted, but even to those where a motion for judgment for want of a reply has been overruled.[9] And they apply also to trials of issues of fact before referees.[10]

§ 54. **When leave is granted to file a pleading of one character a pleading of another character should not be substituted.**— It seems to be the rule that where, after the time for pleading has elapsed, a party obtains leave to file a particular pleading he must file that pleading and no other.[11] In the case

[1] Blondeau v. Sheridan, 81 Mo. 545.

[2] Cole v. Chicago, B. & Q. R. Co., 47 App. 624.

[3] Sheehan Trans. Co. v. Sims, 36 App. 224.

[4] Foley v. Alkire, 52 Mo. 317; Heath v. Goslin, 80 Mo. 310; Turner v. Butler, 126 Mo. 131.

[5] Ladd v. Couzins, 35 Mo. 513. But this is placed upon the ground that the trial court had then no jurisdiction over the case; and that this is the only reason for the ruling is apparent from the decisions collected in the next section.

[6] Hale v. Skinner, 33 Mo. 452.

[7] Howell v. Reynolds County, 51 Mo. 154; Heath v. Goslin, 80 Mo. 310; Miller v. Harper, 63 App. 293; Meader v. Malcolm, 78 Mo. 550; Turner v. Butler, 126 Mo. 131; Ferguson v. Davidson, 147 Mo. 664.

[8] Crow v. Chicago & Alton R. Co., 57 App. 135.

[9] Nelson v. Wallace, 48 App. 193; Hale v. Skinner, 33 Mo. 452.

[10] Turner v. Butler, 126 Mo. 131.

[11] Cooney v. Murdock, 54 Mo. 349.

cited the defendant obtained leave to file an answer in vacation, and instead of filing an answer filed a demurrer, which, on motion of the plaintiff, was stricken out on the ground that it was the well settled rule of practice of that court not to permit a party to file any pleading in vacation differing in character from the one for which leave was granted. This action the supreme court held to be correct. But the next ruling of the lower court the supreme court did not approve. For defendant, immediately after the demurrer was stricken out, tendered his answer and requested leave to file that, which the court refused, and entered up judgment for the plaintiff. The supreme court holds this latter action to have been an abuse of discretion, the answer showing a meritorious defense.[1]

§ 55. **Substituting one pleading for another.**— There is no abuse of discretion in refusing permission to the defendant to withdraw his answer during the trial and to file in its place a demurrer to the petition.[2]

§ 56. **Taking default.**— If the county has over forty thousand inhabitants the cause is triable at the return term; and if the defendant makes default plaintiff is entitled to his assessment of damages and final judgment at such term. In counties having forty thousand inhabitants or less, if defendant has been served thirty days before the first day of the term, or if the action is founded upon a bond, bill or note, it is triable at the return term. If the action is founded upon an open account or upon an account stated, and the items are set forth in or annexed to the petition, and a copy of the account is delivered to the defendant, the action is triable at the return term, and if defendant makes default he thereby admits the correctness of the account as set forth in or annexed to the petition, and final judgment may be rendered against him at the time of entering the default.[3] If the answer of the defendant contains new matter, and plaintiff does not demur or reply to it within the time prescribed by the rule or order of the court, such judgment shall be rendered as defendant is entitled to upon the statement of new matter; and, if the case requires it, a writ of inquiry of damages may issue.[4] Thus, where the answer confesses the cause of action and pleads matter in avoidance, a failure by plaintiff to demur or reply within the time prescribed entitles defendant to a judgment.[5]

[1] Cooney v. Murdock, 54 Mo. 349.
[2] Fadley v. Smith, 23 App. 87.
[3] Rev. Stat. 1899, sec. 597.
[4] Rev. Stat. 1899, sec. 608.
[5] Cordner v. Roberts, 58 App. 440.

**§ 57. Setting aside default.**— There are cases where the appellate court will review the discretion of the trial court in refusing to set aside a default. For, as it is said in *Tucker v. St. Louis Life Ins. Co.*,[1] "it should be the policy of courts to try cases on their merits, wherever such a course will not result in hurtful delay." (p. 593.) This subject, however, more properly belongs in a treatise on Practice.

**§ 58. Lost pleadings.**— If pleadings are lost or destroyed they may be replaced *nunc pro tunc*, so long as the cause remains in the same court.[2] Sections 4560 *et seq.*[3] provide a method by which the court may restore its lost records. But a court has the power independent of the statute to supply its missing papers, records or files; if, however, it is known that they are in the possession of any person, notice must be first given to such person to produce them.[4] Lost records can only be supplied by an order of court. And if the entry does not contain an order for the substitution of another record or paper in the place of the one lost, but merely shows that such record or paper sought to be substituted was presented to the court as a copy of the missing one and filed in the cause, this is not sufficient.[5] The above sections do not apply to a bond given on an appeal from a justice of the peace; if such a bond is lost, its contents may be proved by parol.[6]

[1] 63 Mo. 588.

[2] Chambers v. Astor, 1 Mo. 327; St. Louis, Cape G. & Ft. S. R. Co. v. Holladay, 131 Mo. 440.

[3] Rev. Stat. 1899.

[4] St. Louis, Cape G. & Ft. S. R. Co. v. Holladay, 131 Mo. 440.

[5] Newton v. Strang, 48 App. 538.

[6] Compton v. Arnold, 54 Mo. 147.

That an action or a defense may be maintained on a lost instrument, see §§ 338, 724, *post.*

## CHAPTER IV.

### WHAT SHOULD BE STATED IN PLEADING.


§ 59. The rules are to be found in the Code itself.
60. Pleading defined.
61. The Code requires pleadings to be special.
62. Facts must be directly averred.
63. Exceptions to general rule.
64. What is a sufficient statement.
65. The office of pleadings.
66. Naming parties.
67. Forms.
§ 68. Only one form of action.
69. Form of the prayer.
70. Alternative pleading.
71. Both alternatives must be good.
72. Matter which is peculiarly within the knowledge of one of the parties.
73. Averments must be consistent.
74. Surplusage.
75. Surplusage in answer.


**§ 59. The rules are to be found in the Code itself.**—I have said in the introductory chapter that the Code of Procedure was not intended to be a modification of the common-law procedure, but that it was a radical departure from the common-law practice; that it was not a reform of old methods, but a new method. In no particular is this intention more clearly shown than in the section laying down the general principles upon which pleadings are to be decided. Section 591[1] provides, in language of unmistakable import, that the Code itself is to furnish the rules by which the validity and effect of pleadings are to be determined in this state. Yet it is only by gradual steps that the courts have been led to accept the reformed system in its letter and spirit. In this respect the advance has not been uniform. At times there has been a distinct and marked retrogression. As will be seen in subsequent chapters, there has developed in some of the very recently decided cases an inclination to return to the most rigid rules of the common law. But, on the whole, the rulings manifest a determination to adopt a liberal view, and to give to the Code such an interpretation as will tend to work out the beneficent reform which it was designed to accomplish. Yet, while I use the term "liberal," I might more properly say "strict." For what is required on the part of the courts in states which have adopted the Code is a strict adherence to its terms and re-

[1] Rev. Stat. 1899.

quirements. And I believe that if the courts should hold the bar to a strict compliance with its provisions, not only would a system be worked out equally harmonious with the common-law system, but one which would avoid the great injustice and manifold hardships which follow from the common-law practice,— a system which would as nearly as is possible to any human system attain the object of all legal proceedings, the securing of justice to both adversary parties and the preventing either party from obtaining an undue advantage. It was the intention of the framers of the Code that the system should be complete in itself. This seems to be clearly manifested by the provisions of the first section of the article on pleading.[1] That section provides that the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed by the article, except where it is otherwise specially provided by law.[2] Any attempt, therefore, to engraft upon the Code the rules of the common law in matters of form or procedure is in direct contravention of this express requirement of our statute. And an examination of the adjudged cases in the different code states, showing as they do much confusion and uncertainty in applying the provisions of the practice act, will go far to convince the practitioner that it is exceedingly unfortunate that the courts, in passing upon questions of form in pleading, should have been at all governed by the analogies drawn from the common law.

**§ 60. Pleading defined.**— In *Edgell v. Sigerson*[3] it is said: "The common-law definition of a pleading is 'the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense,' which is the very language used by our Code in defining a complaint and answer. Facts, and facts only, are to be stated. The pleader must not descend into a mere detail of the evidence, nor stop short at general conclusions of law, but must set down the issuable facts, and them only." The statute provides that no allegations shall be made in a pleading which the law does not require to be proved, and that only the substantive facts necessary to constitute the cause of action or the defense are to be stated.[4]

**§ 61. The Code requires pleadings to be special.**— The intention of the practice act is to make all pleadings special, and

[1] Rev. Stat. 1899, sec. 591.
[2] Stillwell v. Hamm, 97 Mo. 579, 585.
[3] 20 Mo. 494.
[4] R. S. 1899, sec. 610.

to abolish all general averments which state merely conclusions of law. In other words, the design of code pleading is that there should be a statement of all the facts necessary to make out a cause of action, omitting all mere evidence and all conclusions of law.[1] Therefore, whatever is essential to be proved must be alleged in the pleadings.[2] And though the pleadings are not now required to be sworn to, except in certain special proceedings, yet the obligation of essential truth is as much a requisite of pleading as ever, and sham counts are as much at war with the spirit of the Code as unnecessary repetition is with its letter.[3]

§ 62. **Facts must be directly averred.**— All facts constituting the cause of action or the defense must be directly, distinctly and definitely averred, or, if intended to be traversed, unequivocally denied, so that nothing shall be left to conjecture or inference.[4] And the material facts should be distinctly and not inferentially alleged, since the court will not supply by intendment an averment which the pleader has failed to make.[5] It is said by Sherwood, J., in *Huston v. Tyler*,[6] that the fundamental requirements of good pleading are and must remain the same, whether under code or at common law. (p. 264.)

§ 63. **Exceptions to general rule.**— There are some special cases where the rules of pleading do not require even the constitutive or ultimate facts to be pleaded, but where the pleader merely states the conclusion of law upon which his right to relief rests. Such are the possessory actions of replevin and ejectment, where plaintiff merely states that he is entitled to the possession of a certain chattel or of a certain piece of land, and that defendant unjustly detains it from him. There are undoubtedly other cases where the law proceeds so far in the opposite direction as for greater certainty to require the pleading of what may be called evidentiary facts. But the general rule lies between these two extremes. That general rule is that the pleading sustains a twofold office: *First*, to advise the opposite party of the state of the case which he is called upon to meet; *second*, to state a collection of constitutive facts upon which the plaintiff, as a

[1] Gamage v. Bushell, 1 App. 416; Scott v. Robards, 67 Mo. 289; Pier v. Heinrichoffen, 52 Mo. 333.

[2] McConey v. Wallace, 22 App. 377.

[3] Druiding v. Lyon, 7 App. 199.

[4] Bredell v. Alexander, 8 App. 110.

[5] Cook v. Putnam County, 70 Mo. 668. That this, however, does not abrogate the rule that the facts which are necessarily inferred from the facts pleaded will be held to have been averred, will be shown hereafter. See § 117, *post*.

[6] 140 Mo. 252.

legal conclusion, is entitled to relief, to the end that, if those facts are deemed insufficient in law by the defendant, he may challenge them by a demurrer, and thus possibly avoid the expense and vexation of a trial.[1] Both of these offices of pleading must in general be fulfilled. Thus, in an action of replevin, though the statute only mentions that the plaintiff must be entitled to the possession of the chattel, yet a petition is not good unless it shows that this right to possession is based upon a property, either general or special, in the plaintiff.[2]

**§ 64. What is a sufficient statement.**— Though the averments of a pleading may be grammatically incorrect, yet they are not on that account necessarily insufficient.[3] The rule of pleading under the Code is that, by taking the language in its plain and ordinary meaning, such an interpretation should be given to it as fairly appears to have been intended by the pleader.[4] A pleading ought to be held good if it so fully advises the opponent of the nature of the demand or defense that the latter will not be misled.[5] While it may appear that the rules of pleading are technical and often strict, yet these rules do not rest alone on the arbitrary will of the lawmaker, but are founded in that sense of justice which recognizes the right of every party to a suit to require of his adversary a clear and unequivocal statement of his side of the case. If this right is demanded in due form and in season, it must be heeded as a demand of justice, and it is no answer to say that the demand is technical. But, on the other hand, justice will not allow a party to lie in wait for his adversary to take his chances on a verdict, and then, if it be against him, profit by the strict technicality of the science of pleading, if a liberal construction can obviate the objection.[6]

**§ 65. The office of pleadings.**— It is the office of pleadings to set forth causes of actions and defenses whose legal sufficiency is always a question of law.[7] The issues in a cause must be raised by the pleadings, and cannot be enlarged by the evidence or by

[1] Loehr v. Murphy, 45 App. 519.

[2] Benedict Mfg. Co. v. Jones, 60 App. 219. Other illustrations of this doctrine will be found in chapters XIII and XV.

[3] Parsons v. Mayfield, 73 App. 309.

[4] Hickory County v. Fugate, 143 Mo. 71.

[5] Wilcoxson v. Darr, 139 Mo. 660, 675.

[6] Cobb v. Lindell R. Co., 149 Mo. 135; Oglesby v. Mo. Pac. R. Co., 150 Mo. 137. An example of a pleading which most glaringly fails to contain "a plain and concise statement of the facts" will be found in the answer set up in Lyman v. Campbell, 34 App. 213, on pp. 218–220.

[7] Worthington v. Lindell R. Co., 72 App. 162.

the instructions, or by both combined.[1] While the use of formal and technical averments, which were necessary at common law to the statement of a cause of action, have been dispensed with by the Code and are no longer necessary, the same material allegations are necessary as at common law.[2]

§ 66. **Naming parties.**— In all proceedings the christian and surname of both plaintiff and defendant should be set forth in the pleadings with accuracy.[3]

§ 67. **Forms.**— Questions relating to the forms of actions will continually crop out in every part of this work. Yet, except in some special pleadings, in which the statute makes form essential by expressly prescribing what it shall be, the code pleading has nothing to do with forms. Herein lies an essential distinction between the former practice and the present — a distinction which cannot be too earnestly insisted on. At common law, form was at least of equal importance with substance.[4] Says one of the best known writers on the rules governing pleadings at common law: "There are two indispensable requisites to all good pleading: *first*, that the matter pleaded be sufficient in law to avail the party who pleads it; and *second*, that it be deduced and alleged according to the forms of law. And if *either of these requisites* is omitted, the pleading is ill. For all pleading is required to be sufficient, not only in substance but in form also. By which latter term we are here to understand those technical or artificial modes of introducing and detailing the subject-matter pleaded which have been established by usage, and which cannot be dispensed with without impairing that certainty, regularity and uniformity which are essential in all judicial proceedings."[5] And on a subsequent page he makes the following important additional statement: "What is termed 'form' in pleading constitutes no distinct matter, but simply the manner in which the matter pleaded is stated." (p. 41.) As to this manner of stating the matter pleaded the Code is express; it must be a plain and concise statement of the facts constituting the cause of action or defense, without unnecessary repetition.[6]

[1] Christian v. Conn. Mut. Life Ins. Co., 143 Mo. 460.

[2] Citizens' Bank v. Tiger Tail Mill & Land Co., 152 Mo. 145.

[3] Turner v. Gregory, 151 Mo. 100. This point is more fully considered in chapter XI.

[4] Sumner v. Tuck, 10 App. 269, 276.

[5] Gould on Pleading (4th ed.), p. 38.

[6] In the Revised Statutes of 1855, forms of various kinds are set out, forms for pleading in courts of record and before justices. Those forms, with additions, have been continued in the

**§ 68. Only one form of action.**— There is in this state but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action.[1] No language can be more positive and express than this. If section 539 does not abolish all distinctions between forms of action, it is because it is impossible to abolish those distinctions. And such an impossibility no one will assert. The distinctive principles governing different causes of action cannot be abolished. They are inherent.[2] But it is possible, it is easy, to express them all in one way; *i. e.*, by simply stating the facts which constitute the particular cause of action in plain and concise terms. As is said by Lewis, P. J., in *Sumner v. Tuck:*[3] "In a code system the jurisdiction looks first of all to the fact of a grievance demanding redress, and, asking no question about the particular form in which the demand is made, declares that one form, the civil action, shall suffice for any and every case wherein the grievance and the right of redress shall plainly appear." (p. 276.) But I repeat, while the common-law forms have been abolished, it by no means follows that the law governing the actions in which the forms were used has been changed. In a case decided in 1870 Judge Wagner said: "While the difference in form and the technicalities in pleading have been dispensed with, and the party need only state his cause of action in ordinary and concise language, whether it be under *assumpsit*, trover, trespass or ejectment, without regard to the ancient forms, still the distinction between these actions has not been destroyed but remains the same."[4] So too the rule applies to the distinction between common-law actions *ex contractu* and *ex delicto*.[5]

Nevertheless, it remains true that if the facts alleged are sufficient to warrant a recovery, it makes no difference whether the action be called one in *assumpsit* or a special action on the con-

various revisions down to the present time. It has never been contended that the forms in question had legislative sanction, or even judicial sanction. Yet, as they have been in more or less constant use and have been continued in the successive revisions, it has been held that they are not without persuasive force. Warnick v. Baker, 42 App. 439, 442.

[1] Rev. Stat. 1899, sec. 539; Clark v. Clark, 86 Mo. 114; Knipper v. Blumenthal, 107 Mo. 665.

[2] Sumner v. Rogers, 90 Mo. 324, 329.

[3] 10 App. 269.

[4] Magwire v. Tyler, 47 Mo. 115, 128. The same doctrine is announced in Huston v. Tyler, 140 Mo. 252, 263.

[5] Sumner v. Rogers, 90 Mo. 324, 329.

tract.[1] As illustrating this rule, take the case of goods sold to be paid for by note or bill. At common law if the purchaser failed to give the note or bill, the vendor could not maintain *assumpsit* on the general count for goods sold and delivered until the time had expired for which the note or bill was to run; but he might immediately bring an action for breach of the special agreement, and his damages would be the price of the goods. Inasmuch as the Code abolishes the old forms of action, a petition is good if such facts appear in it as would justify a judgment at common law under either of the above forms of action.[1]

§ 69. **Form of the prayer.**— There is one class of cases in which it may with some truth be said that the form is of importance. But in those cases it is not so much the form of the pleading as a whole as the form of the prayer for relief which is in question. For it is often of importance to all concerned to know what relief plaintiff demands, in order to determine the proper constitutional mode of trial. On this account it is sometimes necessary to recur to the inherent distinctions between legal and equitable rights and remedies, and to insist that parties asking aid of the court shall state the nature of the relief desired as well as the facts on which they demand it.[2] If the petition is framed on the theory that it is sought to enforce equitable rights, and it appears on the trial that the plaintiff has no equities which the court is bound to enforce, the bill must be dismissed. And this for the reason that defendant is entitled to a trial of the issues by a jury, and plaintiff will not be allowed to deprive him of this statutory right by adopting an equitable form of procedure.[3] This point has, however, been fully discussed in the chapter on Legal and Equitable Proceedings (ch. I), and will also receive some notice in chapter XIV, and need be only mentioned here.

§ 70. **Alternative pleading.**— Either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance of whether it be one or the other.[4] This section is not to be construed as permitting a party to plead conditionally or in the alternative.[5] Much less can a plaintiff ask in his petition that if he should have mistaken his remedy, and should have failed to obtain the relief he has prayed

[1] Globe Light & Heat Co. v. Doud, 47 App. 439.

[2] Rush v. Brown, 101 Mo. 586, 591.

[3] Rutherford v. Williams, 42 Mo. 18; Humphreys v. Atlantic Milling Co., 98 Mo. 542.

[4] Rev. Stat. 1899, sec. 626.

[5] Bauer v. Wagner, 39 Mo. 385.

for, another and a different cause of action may be tried.[1] Thus, if a suit is brought to enforce a trust with reference to specific property, and plaintiff prays a divestiture of the title, and then goes further and asks that, if the court should refuse his prayer, the rights of plaintiff and defendant may be ascertained and a partition and division be decreed accordingly, such relief will not be granted.[2] And where an action of replevin is brought, plaintiff cannot ask that if his claim to the property is defeated he may recover on a warranty of the title.[3] It is questionable just how far the common-law rule has been changed by the above section.[4] In 1843, before the adoption of the act, an action was brought against a justice of the peace for misconduct in office, and it was alleged in the declaration that a certain note on which the action had been brought before the defendant was, through his neglect, lost or destroyed. The supreme court held that this was bad pleading, and that the plaintiff should have made two counts, charging in one that the note was lost and in the other that it was destroyed.[5] The statute makes no provision for charging facts on information and belief except in alternative pleading;[6] and then the fact must be positively alleged, coupled with an averment of plaintiff's belief in one or the other alternative so alleged.[7]

**§ 71. Both alternatives must be good.**— The rule is that both alternatives must be good as matter of law. If pleaded by the plaintiff each alternative must state a legal cause of action; and if either of the statements is insufficient in law, the entire pleading is defective.[8] If it is the defendant who pleads in the alternative, each of the alternatives must by themselves, if true, constitute a defense.[9]

**§ 72. Matter which is peculiarly within the knowledge of one of the parties.**— Matter more in the knowledge of one party

[1] Robinson v. Rice, 20 Mo. 229; Pensenneau v. Pensenneau, 22 Mo. 27.

[2] Pensenneau v. Pensenneau, 22 Mo. 27.

[3] Robinson v. Rice, 20 Mo. 229.

[4] Rev. Stat. 1899, sec. 626.

[5] Stone v. Graves, 8 Mo. 148. But if the action had been brought after the adoption of the Code, and the petition had alleged that the defendant either negligently lost the note or negligently destroyed it, that plaintiff believed that one or the other alternative was true, but did not know which one was true, I apprehend that the petition would have been held good.

[6] See Rev. Stat. 1899, sec. 626.

[7] Nichols-Shepard Co. v. Hubert, 150 Mo. 620. The answer may deny any knowledge or information sufficient to form a belief (Rev. Stat. 1899, sec. 604); and so may a reply (sec. 609).

[8] Hewitt v. Truitt, 23 App. 443.

[9] Beall v. January, 62 Mo. 434.

than the other must be pleaded by the party having that knowledge.[1] If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.[2]

§ 73. **Averments must be consistent.**— A plaintiff will not be permitted to recover the fruits of an illegal transaction, and at the same time and in the same suit obtain the benefit of a decree annulling the transaction. Therefore, where he seeks to recover upon certain certificates issued by a bank, and at the same time attacks for illegality the transaction upon which the certificates were issued and asks for equitable relief and the appointment of a receiver to wind up the business of the bank, the two positions are so repugnant as to render the petition bad.[3] In an action by the state on a collector's bond for failure to pay into the state treasury the amount of certain taxes collected by him as such, it being alleged that the taxes belonged to the state revenue and the state interest fund, it is not necessary that the petition should go further and negative the presumption that the collector paid the amounts collected into the county treasury, since such an allegation would be inconsistent with the theory of the case.[4]

§ 74. **Surplusage.**— Whatever facts are alleged in the petition which are unnecessary to sustain the plaintiff's case are mere surplusage.[5] The plaintiff will not be deprived of his verdict and judgment because he has alleged too much, since the surplusage may be rejected.[6] And this was the rule at common law.[7] If he states more than is required he does not thereby forfeit his right to recover upon proof of facts essential to his right of action, if such facts are set out in his petition.[8] "It is the settled interpretation of the practice act," says Lewis, P. J., "that if a petition sets forth facts sufficient to constitute a cause of action, the plaintiff's right of redress is not to be prejudiced by the fact that further and unnecessary statements are superadded. If he states and proves a right of recovery upon contract, he is not to be denied a judgment because there are also allegations of fraud or deceit which he has failed to prove."[9] In an action against a

[1] Owens v. Geiger, 2 Mo. 39.

[2] State v. Hathaway, 115 Mo. 36.

[3] Mansfield v. Bank of Monett, 74 App. 200.

[4] State ex rel. v. Seibert, 148 Mo. 408.

[5] Guinotte v. Ridge, 46 App. 254. That surplusage may exist in the caption of the petition, as well as in the body of it, see § 244, *post*.

[6] Koopman v. Cahoon, 47 App. 357.

[7] Crocker v. Mann, 3 Mo. 472.

[8] Walker v. Missouri Pacific R. Co., 68 App. 465.

[9] Sumner v. Tuck, 10 App. 269, 278.

carrier the plaintiff pleaded a verbal contract to furnish cars at a given time, and then proceeded to allege that the defendant negligently failed to perform its contract. This allegation of negligence was manifestly surplusage, and the action on the contract would not be thereby converted into an action for negligence.[1]

**§ 75. Surplusage in answer.**— Surplusage in an answer is no ground for a demurrer.[2]

[1] Gann v. Chicago Great W. R. Co., 72 App. 34.

The question of surplusage is also incidentally discussed in chapter XIII (see §§ 278–282); also in the chapter on The Prayer (ch. XIV). See also §§ 85, 97–102, *post*.

[2] Isaacs v. Skrainka, 13 App. 593.

## CHAPTER V.

### SAME SUBJECT—PLEADING AND PROOF.


§ 76. Facts not alleged cannot be proved.
77. The rule applies to cases in equity.
78. Pleading and proof—Illustrations.
81. Pleading and proof—Contracts.
82. Same—Contract made by agent.
83. Performance.
84. In cases based on negligence.
85. Cases of negligence—Illustrations.
87. The rule in cases of negligence applies to the answer.
88. Recovering damages.
89. Damages in attachment suits.
90. Pleading and proof in actions for slander.
92. Same—Not necessary to prove all the words.
93. Same—Foreign words.
94. Pleading and proof in garnishment proceedings.
95. Pleading and proof in mechanics' lien suits.
96. The relief prayed for.
97. Need not prove all the allegations.
100. The above rule applies to an answer.
101. Unnecessary allegations may be so pleaded as to require proof of them.
102. Cases in point.
103. Proving negative allegations.
104. Necessity of pleading waiver.
106. Waiver in actions on insurance policies.
107. Method of pleading waiver.


**§ 76. Facts not alleged cannot be proved.**—It has always been the law in this state that it is erroneous to submit to the jury an issue of fact concerning which no allegation is made in the pleadings. The trial issues must in all cases be within the paper issues.[1] No allegations are to be made in a pleading which the law does not require to be proved.[2] The plaintiff must state the facts upon which he bases his cause of action as they exist; he cannot set up one state of facts and recover upon another. If he fails to state facts sufficient to constitute a cause of action, he cannot supply the defect by evidence at the trial.[3] If the petition states a cause of action on an express contract, there can be no recovery upon a *quantum meruit*.[4] It necessarily follows that

[1] Fulkerson v. Thornton, 68 Mo. 468; Kenney v. Railroad Co., 70 Mo. 252; Melvin v. Railroad Co., 89 Mo. 106; Rothschild v. Frensdorf, 21 App. 318; Whitlock v. Appleby, 49 Mo. 295.

[2] Rev. Stat. 1899, sec. 610.

[3] Field v. Chicago, R. I. & P. R. Co., 76 Mo. 614.

[4] Traders' Bank v. Payne, 31 App. 512.

a plaintiff cannot recover upon a theory of the case which is adverse to that upon which his petition proceeds.[1] It also follows that, if he cannot prove facts not pleaded, he is not entitled to an instruction based upon such facts.[2]

§ 77. **The rule applies to cases in equity.**— The rule that no defense will be considered which is not embraced in the issue raised by the pleadings applies to cases in equity as well as to those at law.[3] Plaintiff filed a bill in equity to have a mistake in a mortgage corrected. The answer set up as the sole defense that plaintiff knew of the mistake. Defendant was permitted to prove that the mortgage was given for a pre-existing debt, and that therefore plaintiff was not a purchaser for value. It was held that a judgment rendered on this ground and based upon this evidence would not be permitted to stand.[4]

§ 78. **Pleading and proof — Illustrations.**— If the petition counts on a breach of warranty of title, plaintiff cannot recover as for money had and received, nor on the ground of subrogation to the rights of the true owner to whom he has paid the purchase price.[5] Where the petition alleges that plaintiff purchased a note secured by a deed of trust, and that the deed of trust was afterwards improperly released by the payee, and prays to have the release set aside, he cannot recover upon the ground that he paid the note and was subrogated to the rights of the payee therein.[6]

§ 79. In an action for an assault the petition charged that defendant beat and struck plaintiff. The evidence showed that defendant was present aiding and encouraging others in beating and in striking plaintiff, and it was held that as all are principals in such a case, the evidence was sufficient to sustain the allegations of the petition.[7]

§ 80. Where there has been a settlement between debtor and creditor, and notes are given by the debtor to the creditor, which notes, however, are not received in payment of the balance found by the settlement to be due, the creditor may surrender them and maintain his action for their amount as upon an account

[1] Steinberg v. Phœnix Ins. Co., 49 App. 255.

[2] Halpin Mfg. Co. v. School Dist., 54 App. 371; Chitty v. St. Louis, I. Mt. & S. R. Co., 148 Mo. 64.

[3] Central National Bank v. Doran, 109 Mo. 40.

[4] Cox v. Esteb, 68 Mo. 110.

[5] Thompson v. Irwin, 76 App. 418.

[6] Wolff v. Walter, 56 Mo. 292.

[7] Page v. Freeman, 19 Mo. 421; Goetz v. Ambs, 27 Mo. 28.

stated; but he cannot surrender the notes and maintain a suit upon the theory that the account is still an open one, although he sues for the same amount as was found due upon the settlement.[1]

§ 81. **Pleading and proof — Contracts.** — In *Knettle v. Scott*[2] plaintiff sold defendants a threshing machine, part of the price of which was paid at the time. Plaintiff sued for the balance, and the defense was that plaintiff had agreed to accept, as payment of the balance, threshing to be performed by defendants to the amount of such balance, and that defendants were able, willing and ready to do said threshing. The court held that if such was the contract plaintiff could not recover, inasmuch as, where there was an express contract to accept payment in work, plaintiff could not ignore that contract and seek to recover money, provided defendants were ready and willing to perform the work. But if the time within which the work was to be done had elapsed, and defendants had refused to do the work, then plaintiff could recover a money judgment, not upon the ground that he could ignore the contract, but as damages for the breach of the contract on defendants' part. If, on the other hand, the contract was, as contended by plaintiff, that plaintiff agreed to furnish defendants a sufficient amount of threshing to pay the balance, and failed to do so, such fact would constitute no defense to the action, since defendants would be remitted to their action for damages for the breach of plaintiff's contract. And the case of *Beach v. Curle*[3] was cited in support of that proposition. The case was distinguished from *Edwards v. McKee*.[4] There defendant had bought certain horses of plaintiff for $400, and claimed that there was an agreement that he was to have the privilege of paying the sum, or a part of it, in hauling. The court held that this was not a sale of the horses to be paid for in work, but it was a contract in the alternative, and that the hauling was a means by which the payment of money might be defeated, and constituted nothing but a defeasance. After the time limited for payment had elapsed plaintiff's action would lie. The result of these cases is simply to enforce the rule above stated: that a party must declare on the contract as made, and that he cannot ignore the contract and recover on a different state of facts.[5] Even if he recovers a money judgment, the judgment is

[1] McCormick v. Interstate Cons. Rap. Trans. R. Co., 154 Mo. 191.

[2] 18 App. 412.

[3] 15 Mo. 105.

[4] 1 Mo. 123.

[5] If the contract has been modified plaintiff must declare on the modified contract. See § 374, *post*.

not awarded him as the price of the goods, but as damages for a breach of the contract by defendant.

§ 82. **Same — Contract made by agent.**— But where the contract is made by an agent of defendant, it is proper that plaintiff should allege that it was made by the defendant himself.[1] And the rule is carried so far that, where one partner makes a contract for the firm, the petition may allege that defendants made the contract, and it is not even necessary to allege that the defendants constituted a partnership. It is immaterial, too, that the partner who actually made the contract is not joined as a defendant.[2]

§ 83. **Performance.**— If, in an action upon a contract, plaintiff alleges that the several conditions of the contract have been performed upon his part, to which defendant pleads the non-performance of one of the conditions, plaintiff, if he enters a simple denial, will not be allowed to contradict such denial and show an excuse for a non-performance.[3] But where the action is based upon a contract for work performed by the plaintiff, he may, under a general allegation of performance, show that the completion of the work was delayed by the act of the other party. And this is especially the rule when time is not of the essence of the contract.[4]

§ 84. **In cases based on negligence.**— There are many decisions of the Missouri courts tending to establish the rule that under a general charge of negligence, where defendant has not taken the proper steps to compel the plaintiff to make his position more definite in that regard, plaintiff may show any acts of defendant tending to establish negligence. And this rule is not confined to cases originally instituted before a justice of the peace, where the rules of pleading, if any can be said to exist, are much more lenient than in courts of record, but is also recognized in cases originally brought in the circuit court. Thus, it is held in *Boone v. Wabash, St. L. & P. R. Co.*,[5] that where the statement is that defendant by its agents and servants carelessly and negligently with its engine and cars ran over and killed the cow, etc., plaintiff may prove any negligence of defendant which contributed to produce the injury. But where

[1] Gates v. Watson, 54 Mo. 585.

[2] Gates v. Watson, 54 Mo. 585; Lessing v. Sulzbacher, 35 Mo. 445.

[3] Gartside v. Conn. Mut. L. Ins. Co., 8 App. 593.

[4] Pierce City Water Co. v. Pierce City, 61 App. 471.

[5] 20 App. 232.

any specific act of negligence is alleged, the court will confine the plaintiff to the proof of such act, and will not allow him to introduce evidence of other acts, however negligent such acts may be. Therefore, if the petition charges that death resulted from a negligent defect in the plan of the construction of an elevator on which deceased was riding when injured, plaintiff cannot show that the death resulted from negligence in operating the elevator.[1]

§ 85. **Cases of negligence — Illustrations.**— As is stated in the preceding section, if the petition charges specific acts of negligence, the evidence will be confined to the negligence so charged, though the petition also contains a general charge of negligence.[2] And this is true even in a case where it is only necessary to aver negligence in general terms.[3] Where the negligence averred is a collision, and the proof is that the injury was received while attempting to escape from the car to avoid an apprehended collision, there can be no recovery.[4] So if plaintiff predicates his right to recovery upon the violation of an ordinance regulating the speed of the car, if he fails to prove such averment he cannot rely on the proof of common-law negligence in running the car at too great a rate of speed.[5] Where, however, the injury for which the action was brought arose from the falling of an arc lamp which plaintiff was repairing, and the petition alleged that the spool of the lamp was worn out and loose, and added that that was one among other defects in the fastening of the lamp, plaintiff would be entitled to show under the latter averment any negligent insecurity in fastening the lamp.[6] For if the petition alleges more than the plaintiff has been able to prove, he may still recover if the unproven allegations are not essential to his recovery.[7]

§ 86. Where the allegation of the petition is that plaintiff was injured by the unlawful and wrongful shooting of him by defendant, the averment is sustained by proof of a negligent and careless shooting.[8] In an action for personal injuries received

[1] O'Brien v. Western Steel Co., 100 Mo. 182.

[2] Dlauhi v. St. Louis, I. M. & S. R. Co., 139 Mo. 291; McCarty v. Rood Hotel Co., 144 Mo. 397; Chitty v. St. Louis, I. M. & S. R. Co., 148 Mo. 64.

[3] Lachner v. Adams Express Co., 72 App. 13.

[4] Chitty v. St. Louis, I. M. & S. R. Co., 148 Mo. 64.

[5] Hogan v. Citizens' R. Co., 150 Mo. 36.

[6] Gallagher v. Edison Ill. Co., 72 App. 576.

[7] Gannon v. Laclede Gas Light Co., 145 Mo. 502.

[8] Conway v. Reed, 66 Mo. 346.

while attempting to make a crossing where defendant's cars were standing, the averment was that while plaintiff was attempting to pass through an opening between the cars the defendant's employees negligently drove and forced against the stationary cars certain loose cars, whereby the stationary cars were driven against plaintiff and he was injured. The evidence failed to sustain this averment, but did tend to show that the stationary cars were left standing upon the track without being so secured as to prevent their being accidentally set in motion. The court held that, though there was a general allegation of negligence, yet as the specific form of negligence was set forth, and the evidence failed to prove such specific act of negligence, plaintiff was not entitled to recover.[1] And this rule is enforced, even in regard to statements filed before a justice. Thus, in *Milburn v. Hannibal & St. Jos. R. Co.*,[2] the averment was that defendant did negligently and carelessly run over and kill with its engine and cars plaintiff's cattle. It was held that under this allegation plaintiff might have introduced evidence of any fact tending to show negligence, such as that the bell was not rung, or the whistle sounded after the cattle were discovered on the track, that no effort was made to avoid a collision, or that the train was running at a careless rate of speed. But that evidence that defendant permitted grass and water to be near its track, and that cattle were thus attracted to the point of danger, was totally inadmissible.

§ 87. **The rule in cases of negligence applies to the answer.** Where an action is brought against an employer for personal injuries alleged to be due to negligence on the part of the employer, defendant may show that the injuries were caused by the negligence of a fellow-servant, though such defense was not specially pleaded.[3] But an averment in the answer that the injury was caused by the plaintiff's own negligence will not let in the defense that the injury was caused by the negligence of a fellow-servant.[4]

§ 88. **Recovering damages.**— Where in an action for personal injuries the petition does not contain any specific allegation of permanent injury, it is nevertheless proper to show that the injury is a permanent one.[5]

[1] Gurley v. Mo. Pac. R. Co., 93 Mo. 445.

[2] 21 App. 426.

[3] Sheehan v. Prosser, 55 App. 569.

[4] Higgins v. Missouri Pac. R. Co., 43 App. 547. Consult also § 100, *post.*

[5] Cook v. Mo. Pac. R. Co., 19 App. 329.

§ 89. **Damages in attachment suits.**— Plaintiff suing on an attachment bond alleged that he was required to pay out large sums of money in defense of the suit, and that he suffered a loss of time in attending it; that he was deprived of the use of the money which had been attached, was injured in his business, etc. The court held that these allegations were sufficient to warrant a recovery for attorneys' fees and for extra expenditures in the suit.[1] And an allegation in such an action that plaintiff was compelled to and did lay out and expend large sums of money, and was put to great expense and trouble in and about defending said action, to wit, $500, is sufficient to authorize evidence as to lawyers' fees, hotel bills, etc.[2]

§ 90. **Pleading and proof in actions for slander.**— It is not necessary to prove the speaking of the identical words charged in the petition; but either the identical words must be proved or substantially the same words.[3] The exact language alleged to have been used by defendant must be proved or enough of the exact language to constitute the charge.[4] In other words, the slander proved must substantially correspond with that charged in the petition.[5] It is not enough that the words proved are equivalent in meaning to the words charged, for if they are not substantially the same words, but contain the charge in different phraseology, plaintiff cannot recover.[6] Therefore an instruction that if the words proved have the same sense as the words alleged, there is no variance, is erroneous.[7] As it is the words which contain the poison to the character and impute the crime which must be proved as laid, an instruction requiring the jury to believe from the evidence that the defendant spoke the words charged in the petition, or enough of said words to constitute the charge that plaintiff was a thief, is proper enough.[8]

§ 91. So far has this rule been carried that if the words charged are in the second person, as that "you stole two of my hogs," the charge is not sustained by proof of a speaking in the third person, as "he stole two of my hogs."[9] It follows that if the charge

[1] State v. McHale, 16 App. 478.

[2] Kelly v. Beauchamp, 59 Mo. 178.

[3] Noeninger v. Vogt, 88 Mo. 589; Walter v. Hoeffner, 51 App. 46.

[4] Coe v. Griggs, 76 Mo. 619; Wood v. Hilbish, 23 App. 389.

[5] Baldwin v. Fries, 46 App. 288.

[6] Berry v. Dryden, 7 Mo. 324; Birch v. Benton, 26 Mo. 153; Coe v. Griggs, 76 Mo. 619; Wood v. Hilbish, 23 App. 389; Noeninger v. Vogt, 88 Mo. 589; Baldwin v. Fries, 46 App. 288.

[7] Christal v. Craig, 80 Mo. 367.

[8] Baldwin v. Fries, 46 App. 288.

[9] Williams v. Harrison, 3 Mo. 411. And this ruling is followed in Bundy v. Hart, 46 Mo. 460.

is that defendant spoke the words directly to the plaintiff, proof of a speaking by defendant to a third person of and concerning the plaintiff will not sustain the petition.[1]

§ 92. **Same — Not necessary to prove all the words.**— It is not necessary to prove all the words charged, provided the identical words containing the slanderous imputation are proved.[2] And if the proof develops an omission or addition of words in no way varying or affecting the sense of the charge, this will not constitute a fatal variance.[3] But the words proved must contain the poison to the character and constitute the precise charge of slander alleged.[4]

§ 93. **Same — Foreign words.**— Where the words were spoken in a foreign language, the rule that they must be substantially those charged in the petition applies to the words in the vernacular in which they are uttered; but if they are correctly translated in the petition, it is immaterial that a witness in translating them uses equivalent words and expressions.[5]

§ 94. **Pleading and proof in garnishment proceedings.**— In a garnishment proceeding it is immaterial, at least after verdict, that the parties disregarded the issues made by the pleadings, and tried the cause on issues made at the trial, and indicated in the instructions, no question of surprise being raised.[6]

§ 95. **Pleading and proof in mechanics' lien suits.**— Where the petition alleges that plaintiffs were the original contractors, and the answer contains a denial of that fact, but does not set up the limitation prescribed by the statute, defendants cannot be permitted to show that plaintiffs had only four months in which to bring their action, instead of six months.[7]

§ 96. **The relief prayed for.**— It is the settled law of this state that the court is not confined to the specific relief prayed for, but will grant such relief as the facts alleged and proved will warrant, if the prayer is sufficiently broad to cover such relief. Yet a plaintiff cannot ask the court to grant him a relief of one nature and then ask, if he is mistaken in the relief to which he is entitled, that one of an entirely different nature shall be granted

[1] Schmidt v. Bauer, 60 App. 212.

[2] Pennington v. Meeks, 46 Mo. 217.

[3] Baldwin v. Fries, 46 App. 288; Unterberger v. Scharff, 51 App. 102; Noeninger v. Vogt, 88 Mo. 589.

[4] Hillebrand v. Dreinhoefer, 13 App. 586; Lewis v. McDaniel, 82 Mo. 577; Mix v. McCoy, 22 App. 488.

[5] Noeninger v. Vogt, 88 Mo. 589.

[6] St. Louis Coffin Co. v. Rubelman, 15 App. 280.

[7] Hearne v. Chillicothe & B. R. Co., 53 Mo. 324.

him. The cases on this point will be found in the chapter on The Prayer.[1]

**§ 97. Need not prove all the allegations.**— It is a well recognized rule of practice that every averment even of material matter need not be proved. If there be sufficient proof of the remaining substantive allegations constituting a cause of action the ends of the law are attained.[2] If the petition contains averments of more facts than plaintiff is required to state, this does not preclude a recovery if all the facts essential to make out his case are averred and proved.[3] A petition will not be dismissed because the evidence does not support certain charges contained in it, if it does support other averments which are sufficient to authorize a recovery.[4] Nor will the plaintiff be driven out of court simply because his petition alleges more than he has proved, if the unproven allegations are not necessary to authorize a recovery.[5] The case cited was one brought by a wife to recover damages for the death of her husband, which occurred on one of the public alleys of St. Louis while in the discharge of his duty as a member of the fire department in that city. His death was caused by stepping on an electric wire belonging to defendant which was charged with electricity. A petition in such a case is sufficient if, by proper averments, it charges that defendant had negligently suffered such electric wire so charged with electricity to become broken and fall to the pavement of the alley. The petition in this case contained such averments; but it also contained additional averments of carelessness on the part of defendant to the effect that it knew, or ought by the exercise of care and caution to have known, that the wire in question was broken and down, and liable, if touched by a human being while so broken and down and charged with electricity, to destroy his life. It was held that the fact that these additional averments were not proven was not fatal to a recovery by plaintiff, if her proof was such as to make a *prima facie* case of negligence under the general charge.[6]

§ 98. Under the statute making a railroad company responsible for damages to property injured or destroyed by fire communi-

[1] Ch. XIV. See also § 70, *ante*.

[2] Morrow v. Surber, 97 Mo. 155; Kehoe v. Taylor, 31 App. 588.

[3] Radcliffe v. St. Louis, I. M. & S. R. Co., 90 Mo. 127.

[4] Knox County v. Goggin, 105 Mo. 182.

[5] Gannon v. Laclede Gas Light Co., 145 Mo. 502.

[6] See also on this subject, § 74, *ante*, and ch. XIII.

cated by its locomotive, it is not necessary to charge the railroad company with negligence; and even if the petition does contain a charge of negligence, but no attempt is made to prove the averment, a verdict in favor of the plaintiff will nevertheless be upheld if sufficient facts are averred and proved to bring the case within the statute.[1]

§ 99. Where, in an action to recover money paid by mistake, the petition also contains allegations as to certain misrepresentations made by the defendant to plaintiff's clerk, if the mistake affords sufficient ground for relief it is not necessary to prove the misrepresentations.[2] Mr. Kerr says in his work on Fraud and Mistake that, if the bill alleges a case of fraud, and the title to relief rests upon the fraud only, the bill will be dismissed if the fraud as alleged be not proved. It cannot be allowed to be used for any secondary purpose. But if the case does not entirely rest upon the proof of fraud, but rests also upon other matters which are sufficient to give the court jurisdiction, and the case of fraud is not proved, but the other matters are proved, relief will be given in respect of so much of the bill as is proved.[3]

**§ 100. The above rule applies to an answer.**— The fact that an answer is drawn too broadly does not require that defendants offer proof or submit to instructions as broad as the allegations of the answer.[4] And though the answer contain averments that are superfluous and that in themselves constitute no defense, yet if the plea as a whole presents a good defense it cannot be stricken out.[5]

**§ 101. Unnecessary allegations may be so pleaded as to require proof of them.**— Yet pleadings may be so shaped as to make that material and necessary to be traversed which otherwise would not be.[6] In his work on Remedies and Remedial Rights, Mr. Pomeroy says: "A plaintiff may insert in his pleading allegations which are unnecessary in that position, and which are not in conformity with the perfect logic of the system, but which, when once introduced, become material, so that an issue is formed upon them by a general denial."[7] Such facts must be proved by the plaintiff as alleged. That a party may be held

[1] Fields v. Wabash R. Co., 80 App. 603.

[2] Morrow v. Surber, 97 Mo. 155.

[3] Cited in Kehoe v. Taylor, 31 App. 588, 597.

[4] Frederick v. Allgaier, 88 Mo. 598.

[5] Third National Bank v. Owen, 101 Mo. 558. Consult also § 87, *ante*.

[6] Kansas City Hotel Co. v. Sauer, 65 Mo. 279.

[7] Sec. 667.

to prove an unnecessary averment, if it is not immaterial, where he has averred more than is essential to a recovery, is the rule in this state.[1] Thus in an action for breach of warranty of the soundness of an animal, the petition not only contained an averment that the animal was unsound, but a further averment that the disease constituting the unsoundness was glanders; and it was held that, although this last averment was unnecessary, yet as the pleader had thought proper to make the averment he was bound to prove it, since unnecessary averments, unless they are immaterial, must be proved.[2] So, too, where the plaintiff unnecessarily restricts the issues by his allegations, he will be bound to the issue thus limited.[3]

§ 102. **Cases in point.**— Where one has contracted to purchase stock from a corporation, and the payment of the money and the delivery of the stock were to be simultaneous acts, the company may commence an action for breach of the contract without averring an offer or readiness on its part to perform the contract by having the shares of stock ready for transfer and delivery. But if, instead of bringing such an action, it brings an action for the contract price of the shares, and avers its readiness to comply with the contract, this averment of readiness to comply becomes essential and must be proved in order to a recovery.[4] Where a special tax-bill issued by a city of the third class is sued on by an assignee, he need only allege the making of the bill, its contents and date, its assignment, the filing of it, and that defendant owns the lot against which he seeks to establish the lien. If additional allegations are made, stating facts which show an improper authorization of the work, such allegations are fatal to the petition, and a demurrer will lie to it.[5]

§ 103. **Proving negative allegations.**— If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.[6] It has been held by the supreme court that, in an action against a railroad company for injury to an animal, the petition need not negative the fact that the place at which the animal entered upon the track was within the limits of an incorporated town or city, this being an exculpatory fact which it devolves upon the defendant to prove.[7] But this is not in ac-

[1] See ch. XIII.
[2] Lindsay v. Davis, 30 Mo. 406.
[3] Jackson v. Hardin, 83 Mo. 175.
[4] St. Louis Raw Hide Co. v. Hill, 72 App. 142.
[5] Carthage v. Badgley, 73 App. 123.
[6] State v. Hathaway, 115 Mo. 36.
[7] Meyers v. Union Trust Co., 82 Mo. 237.

cord with two earlier decisions of the supreme court,[1] though neither of those cases is mentioned in the *Meyers* case.[2] The St. Louis court of appeals has decided, following the two decisions of the supreme court last cited, that a petition which does not directly aver that the stock was not killed within the limits of an incorporated town is bad, even after verdict.[3]

§ **104. Necessity of pleading waiver.**— If either party relies upon a waiver he must plead it or he will not be permitted to give evidence of it. The rule applies to the breach of a contract.[4] And if there is a plea of compliance with a condition precedent, evidence will not be admitted to show that the condition was waived.[5] If the action is against an indorser of a promissory note, and there is an allegation of demand and notice, plaintiff will not be permitted to show an excuse for not making a demand and giving notice.[6] In a later case, however, it is said that the authorities preponderate, at least in this country, in favor of the view that evidence excusing presentment, or showing a waiver of demand and notice, is admissible in support of the averment of presentment, demand and notice.[7] But the case of *Pier v. Heinrichoffen*, above cited,[6] is approved and followed in *First Nat. Bank v. Hatch;*[8] is reaffirmed in *Nichols v. Larkin;*[9] and is cited with approval in *Lanitz v. King.*[10]

§ 105. In the first case involving this question which came before the Kansas City court of appeals, it was held that an averment in the answer of compliance by defendant with the conditions of a warranty does not authorize the introduction of evidence going to show a waiver by plaintiff of such compliance.[11] And that court holds that if the petition alleges performance of the conditions and obligations on the part of plaintiff, there can be no recovery by showing a waiver of such performance.[12] The same rule is recognized by that court as late as 1895 in the case

[1] Rowland v. St. Louis, I. M. & S. R. Co., 73 Mo. 619; Schulte v. St. Louis, I. M. & S. R. Co., 76 Mo. 324.

[2] Meyers v. Union Trust Co., 82 Mo. 237.

[3] Holland v. West End Narrow Gauge R. Co., 16 App. 172.

[4] McCullough v. Phœnix Ins. Co., 113 Mo. 606.

[5] Nichols v. Larkin, 79 Mo. 264.

[6] Pier v. Heinrichoffen, 52 Mo. 333.

[7] Faulkner v. Faulkner, 73 Mo. 327.

[8] 78 Mo. 13.

[9] 79 Mo. 264.

[10] 93 Mo. 513. See in this connection Pratt v. Hanly, 1 Mo. 35; Dorsey v. Watson, 14 Mo. 59; Clayton v. Phipps, 14 Mo. 399, and Estel v. St. Louis & S. E. R. Co., 56 Mo. 282.

[11] Safety Fund Nat. Bank v. Westlake, 21 App. 565.

[12] Mohney v. Reed, 40 App. 99; Ferneau v. Whitford, 39 App. 311; Roy v. Boteler, 40 App. 213.

of *Brownlow v. Wollard*.[1] On the contrary, the St. Louis court of appeals holds that under an allegation of performance a waiver may be shown;[2] and that where the contract which is the foundation of the action requires performance in a particular way, it may be shown, without specially pleading it, that defendant accepted performance in a different way.[3] Where the performance is prevented or delayed by the act of the other party, it is held by that court that proof of waiver is not an excuse for non-performance, but is proof of performance within the meaning of the condition.[4]

§ **106. Waiver in actions on insurance policies.**— Whatever may be the rule with reference to actions on contracts generally, it may be considered the settled law in this state that, in actions upon policies of insurance, a waiver may be shown under an averment or plea of performance. And the St. Louis court of appeals seems now to hold that the rule announced by it in previous cases is to be confined to insurance cases.[5] The supreme court announces the rule as follows: That proof of waiver is not admissible under an allegation of performance is unquestionably the rule in this state in regard to all kinds of actions except those on policies of insurance; but that in the latter class of cases it has been uniformly held by that court that, under the allegations in the petition that all the conditions of the policy have been complied with, proof of waiver is permissible within the meaning of the conditions in the policy. (Citing cases from that of *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, down to the present time.)[6] Thus, under an allegation that proof of loss was furnished, it may be shown that the proof was waived.[7] And this ruling is now followed by the Kansas City court of appeals.[8]

§ **107. Method of pleading waiver.**— The rule as to waiver being that there can be no waiver in the absence of knowledge of the true situation, in pleading a waiver there must be an allegation that, knowing the contract had not been performed, the

[1] 61 App. 124.

[2] St. Louis Steam Heat. & V. Co. v. Bissell, 41 App. 426; Smith v. Haley, 41 App. 611.

[3] Smith v. Haley, 41 App. 611.

[4] Pierce City Water Co. v. Pierce City, 61 App. 471. See, however, the next succeeding section.

[5] Stephens v. German Ins. Co., 61 App. 194; McCollum v. Niagara Fire Ins. Co., 61 App. 352; McCollum v. North British Mercantile Ins. Co., 65 App. 304.

[6] McCulloch v. Phœnix Ins. Co., 113 Mo. 606; Nickell v. Phœnix Ins. Co., 144 Mo. 420; James v. Mutual Reserve Fund L. Ass'n, 148 Mo. 1.

[7] Nickell v. Phœnix Ins. Co., 144 Mo. 420.

[8] Murphy v. Insurance Co., 70 App. 84.

defendant nevertheless accepted, as and for a full performance, the things done by the plaintiff.[1] The Kansas city court of appeals has held that if, in an action on a contract, the petition alleges performance of the conditions to be performed by plaintiff, and the answer denies performance, plaintiff cannot in his reply allege a waiver, since defendant's denial makes the issue complete, and the allegation of waiver in the reply is inconsistent with the allegation of performance in the petition; nor can the allegation in the reply cure the defect of the petition.[1] And this is undoubtedly the rule announced by the supreme court in *Taylor v. Newman*.[2] But in the later case of *Ehrlich v. Ætna Ins. Co.*,[3] the supreme court distinctly states that the general allegation of performance in the petition will not lay a foundation for the admission of evidence constituting an excuse for non-performance, and that to make an issue of waiver of the breach alleged in the answer, such waiver must be set up in the reply. This last decision is followed by the St. Louis court of appeals in *Pierce City Water Co. v. Pierce City*.[4]

[1] Mohney v. Reed, 40 App. 99.
[2] 77 Mo. 257.
[3] 103 Mo. 231.
[4] 61 App. 471.

## CHAPTER VI.

### SAME SUBJECT—ONLY FACTS ARE TO BE PLEADED.


§ 108. The rule.
109. Cases enforcing the rule.
110. Illustrative cases.
115. Only the ultimate facts need be pleaded.
116. What is meant by the term "ultimate facts."
117. Facts which are inferable from the facts alleged.
§ 118. Facts inferable from facts stated—Illustrations.
127. Contrary inferences not permissible.
128. Facts which are merely evidential should not be pleaded.
129. Extent of this rule.
130. The rule applies in an action for conversion.


**§ 108. The rule.**— The whole theory of the practice act is that facts, and not conclusions of law, should be pleaded. The statute says no allegations shall be made in a pleading which the law does not require to be proved, and only the substantive facts necessary to constitute the cause of action or defense are to be stated.[1] This provision necessarily excludes from pleadings all mere legal fictions, for such fictions require no proof and cannot be traversed.[2]

**§ 109. Cases enforcing the rule.**— The facts constituting the cause of action or the defense are the facts required to be stated. The relief to which the party is entitled is determined by the court as a matter of law from the facts pleaded. Neither evidence nor conclusions of law should be stated.[3] All facts from which the ultimate and conclusive facts may be inferred are evidential and need not be stated; but those facts from which the legal conclusion is to be drawn, and upon which the right of action depends, must be stated.[4] It would be not only unnecessary but highly improper for the pleader to enter into an argument in his favor or to make a statement of his proof.[5]

[1] Rev. Stat. 1899, sec. 610.

[2] Gould on Plead. (4th ed.), p. 48.

[3] Murphy v. Price, 48 Mo. 247; Wiggins v. Graham, 51 Mo. 17; Kerr v. Simmons, 82 Mo. 269; Turley v. Edwards, 18 App. 676; McNees v. Missouri Pac. R. Co., 22 App. 224; Planet Prop. & Fin. Co. v. St. Louis, O. H. & Carond. R. Co., 115 Mo. 613.

[4] Mitchell v. Clinton, 99 Mo. 153.

[5] Van Hoozer v. Van Hoozer, 18 App. 19.

**§ 110. Illustrative cases.**— In an action against a railroad company to recover a rebate which plaintiff alleged the company agreed to allow him on freight shipped by him over its road, it was not error to deny defendant's motion to require plaintiff to make his petition more definite and certain, by stating where and by what officers of defendant the alleged contract was made, whether it was oral or in writing, and, if in writing, that plaintiff be required to file it in court for defendant's inspection, where it appeared that the contract was not in writing, and the petition alleged a contract, set out its terms, averred a breach thereof, and the amount of damages claimed for the breach.[1]

§ 111. If in an action concerning real estate the petition alleges that plaintiff is the owner, it is not necessary that he should trace out his title and show how he became the owner.[2]

§ 112. Where a bill is filed seeking to subject certain property of the defendant to the payment of a debt due to plaintiff on the ground of fraud in a certain conveyance, the petition was indefinite in failing to state the date at which the indebtedness was contracted, and the petition was attacked on that ground. But the court of appeals held that in such a proceeding the nearness or remoteness of the time of contracting the debt relative to the date of the fraudulent conveyance, while important as an evidentiary fact, is not decisive, and the statement of it in the petition is therefore not essential to the statement of a good cause of action.[3]

§ 113. Where plaintiff sues for the conversion of his property by the defendant, the fact of the conversion must be directly alleged in the petition; it is not sufficient to allege it inferentially, or to aver merely a demand and refusal, though these are facts which constitute evidence of a conversion.[4]

§ 114. Where an action is brought on a recognizance, an answer which alleges the surrender of the principal by the bail and the acceptance of such surrender by the sheriff contains all the substantive facts constituting the defense, and it is not necessary to further allege that the acceptance by the sheriff was in writing.[5]

[1] Christie v. Mo. Pac. R. Co., 94 Mo. 453.

[2] Planet Prop. & Fin. Co. v. St. Louis, O. H. & Carond. R. Co., 115 Mo. 613.

[3] Loehr v. Murphy, 45 App. 519.

[4] Perry v. Musser, 68 Mo. 477.

[5] State v. Meyers, 61 Mo. 414.

**§ 115. Only the ultimate facts need be pleaded.**— The Code does not require that the pleader should state specifically the details which go to make up the constitutive facts.[1] The cause of action is the wrong which has been suffered, and the facts that show the wrong show the cause of action; they are the facts to be found, and upon principle they are the facts to be stated by the pleader.[2] It seems they may be pleaded according to their legal effect.[3] Thus a general allegation of warranty is sufficient without stating whether it was express or implied;[3] and the allegation, "belonging to plaintiff," is an allegation of title which carries with it the idea of possession.[4] So, too, a petition which alleges title to certain property in A., and that A. sold, assigned and transferred the property to plaintiff, sufficiently avers title and ownership in plaintiff.[5] It must be remembered, however, that facts which are raised by mere legal implication are not constitutive facts such as are necessary to be averred in order to state a cause of action under our system of pleading.[6]

**§ 116. What is meant by the term "ultimate facts."**— Where an action is based on the breach of a duty, the facts out of which the duty arises must be pleaded.[7] Where a suit is based upon the claim that plaintiff is an innocent purchaser for value, the petition must set out all the allegations necessary to constitute one an innocent purchaser. And where the petition in a suit to cancel a sheriff's deed as constituting a cloud on the title, after stating the source of the title and describing the land, alleges that plaintiff, on the —— day of ——, in good faith and for full value purchased the land of the vendor, who on the same day executed and delivered a deed to plaintiff, who paid the vendor the purchase-money and immediately placed said deed on record and took possession, and ever since has been and now is the owner in fee in possession, such petition fails to state facts

[1] See v. Cox, 16 Mo. 166; Armstrong v. Mo. Pac. R. Co., 17 App. 403; Planet Co. v. Railroad Co., 115 Mo. 613.

[2] Thomas v. Concordia Cannery Co., 68 App. 350, 359.

[3] Long v. Armsby Co., 43 App. 253. As to this point see, however, *post*, § 143 *et seq.*

[4] Warnick v. Baker, 42 App. 439. See also Eans v. Exchange Bank, 79 Mo. 182.

[5] Bank of Odessa v. Jennings, 18 App. 651. See also Ellithrope v. Vogelsang Com. Co., 67 App. 251.

[6] Duff v. Fire Association, 129 Mo. 460, 466; but consult § 343, *post*. As to facts which may be inferred from those alleged, see *post*, § 117 *et seq.*

[7] Field v. Chicago, R. I. & Pac. R. Co., 76 Mo. 614.

sufficient to show that plaintiff was an innocent purchaser.[1] To invoke the aid of a court of equity as a *bona fide* purchaser without notice, the petition must show that plaintiff made his purchase and paid the purchase-money before he had notice of the prior equity. He must show fully and explicitly the time and terms of his purchase and of the payment of the purchase-money.[2] If the action is based upon the fact that an act which was originally without authority has been ratified, the pleader must count on the subsequent promise.[3]

**§ 117. Facts which are inferable from the facts alleged.**— Though a petition may contain no direct averment of some particular fact essential to the cause of action, yet it may so embody such fact by necessary intendment, and by inference from the allegations which are made, as to constitute the statement of a cause of action.[4] Facts which are necessarily implied from the direct averments in a pleading will be treated as having been pleaded.[5] Thus, where the law requires that a contract shall be made in a particular manner, an averment that it was made will be held to imply that it was made in lawful form.[6] It is not necessary to state that a guaranty is in writing.[7] If it is alleged that a deed was executed and recorded, it is equivalent to alleging that it was delivered.[8]

**§ 118. Facts inferable from facts stated — Illustrations.**— Where an action is brought upon an account which plaintiff claims has been assigned to him, an allegation in the petition of the acquisition of title by assignment a few days prior to the institution of the action carries with it a legal intendment of ownership on the date of suit; at least, in the absence of any attack upon the petition for indefiniteness, or any issue made in the answer as to title.[9] A petition which alleges that defendant delivered to plaintiff's intestate a certain certificate of deposit which was payable to the intestate, impliedly alleges that the intestate was the holder and owner thereof.[10]

§ 119. Where a statute provides that an action for death may be brought by the parent if the deceased was a minor and un-

[1] Young v. Schofield, 132 Mo. 650.
[2] Wallace v. Wilson, 30 Mo. 335.
[3] Noble v. Blount, 77 Mo. 235.
[4] Ellsworth Coal Co. v. Quade, 28 App. 421.
[5] Weaver v. Harlan, 48 App. 319.
[6] Stillwell v. Hamm, 97 Mo. 579.
[7] Miles v. Jones, 28 Mo. 87.
[8] McReynolds v. Grubb, 150 Mo. 352. See also § 130, *post*.
[9] Ellithrope v. Vogelsang Com. Co., 67 App. 251.
[10] Eans v. Exchange Bank, 79 Mo. 182.

married, an allegation that the deceased was the infant son of the plaintiffs and was under the age of two years, or under the age of six years, is a sufficient allegation that the deceased was unmarried.[1] Where the action is for personal injuries alleged to have been caused by the negligent act of an employee of defendant, though the petition does not contain an allegation that the act was committed by the employee while he was in discharge of the particular duties pertaining to that employment, yet the petition is not demurrable on that ground, if the omitted allegation might reasonably be implied from other allegations in the petition.[2] A physician brought an action against a railroad company for injuries suffered while a passenger, but the petition contained no direct averment that he was a practicing physician. It did, however, contain the allegation that by his injuries plaintiff had been permanently disabled from practicing his profession as a physician and surgeon, and has lost and will lose his earnings therefrom. Under this averment the court properly admitted evidence that plaintiff was a physician, and that he had lost the earnings of his practice by reason of his injuries.[3]

§ 120. The statement that a defendant railroad company failed and neglected to erect or maintain good or sufficient fences where the stock got on the track, accompanied by a reference to section 1105,[4] which contains the requirements as to fencing the track, avers by implication that it was the duty of defendant to erect and maintain fences at the place in question, and that the stock got on the track in consequence of such failure.[5]

§ 121. When a complaint against a municipality relates to an act which can be lawfully done only under an ordinance, an averment in the petition that the act was done by the corporation implies that it was done in pursuance of an ordinance.[6] Thus, where the action is for negligence in changing the grade of a street, an allegation that the city raised the grade is equivalent to an allegation that the grade was raised in pursuance of an ordinance.[7] So, where the petition alleges that a certain ordinance defining the limits within which private property

[1] Czezewzka v. Benton-Bellefontaine Ry. Co., 121 Mo. 201; Baird v. Citizens' Ry. Co., 146 Mo. 265.

[2] Todd v. Havlin, 72 App. 565.

[3] Mason v. St. Louis, I. M. & S. R. Co., 75 App. 1. See also § 125, *post*.

[4] Rev. Stat. 1899.

[5] Jackson v. St. Louis, I. M. & S. R. Co., 80 Mo. 147.

[6] Stewart v. Clinton, 79 Mo. 603.

[7] Werth v. Springfield, 78 Mo. 107.

would be benefited by the grading of a street was "duly enacted," this inferentially alleges the passing of an ordinance for the grading of the street.[1] In an action against a city to recover damages for change in the grade of a street, it was alleged that defendant was prosecuting the work of changing the grade "to the grade established by ordinance 15,119." From this allegation it is necessarily implied that the work was done in pursuance of some ordinance duly enacted.[2] Where a petition charges that a municipality failed and neglected to keep a street in a safe and suitable condition for public use, and unlawfully and negligently suffered such street to be obstructed, it states facts from which it may be inferred that the municipality had notice of its dangerous condition.[3]

§ 122. The plea of the statute of limitations may be anticipated in the petition by an averment that, before the statute began to run, the defendant departed from, and has ever since resided out of, the state of Missouri, and still so resides, if it inferentially appears from the pleading that defendant was a resident of the state up to the time of such departure.[4]

§ 123. Where in an action of replevin for a saw-mill the petition expressly states that the property was wrongfully seized, and that on the date of the seizure its operation was closed, it will be presumed that the mill was seized in the only manner in which tangible personal property can be legally seized by an officer; that is, by taking it into his possession; and a wrongful taking is therefore sufficiently alleged by reasonable intendment. So, too, a wrongful detention is reasonably alleged, since a state of matters once shown is presumed to continue until the contrary appears, and it is the officer's duty to retain the property seized.[5]

§ 124. In a mechanics' lien suit an allegation that defendant was the owner of the premises is by intendment a sufficient allegation that defendant owned the buildings.[6]

§ 125. In an action for personal injuries received by plaintiff while descending a defective stairway leading from the first floor to the basement floor of a building occupied by defendant, an averment in the petition that defendant occupied the rooms as a

[1] St. Louis v. Lang, 131 Mo. 412.
[2] MacMurray-Judge Iron Co. v. St. Louis, 138 Mo. 608.
[3] Hurst v. Ash Grove, 96 Mo. 168.
[4] Sheehan Trans. Co. v. Sims, 36 App. 224.
[5] Keen v. Munger, 52 App. 660.
[6] Stone v. Taylor, 72 App. 482.

place of business includes by reasonable intendment the averment that he had control of the rooms.[1]

§ 126. In an action on an attachment bond it is not necessary to aver that there was an affidavit for the attachment made and filed, if the petition contains an averment that a plea in abatement was filed in such attachment suit, and that upon the issues tendered by it a trial and judgment were had.[2]

§ 127. **Contrary inferences not permissible.**— When certain facts are pleaded inferences contrary to those facts are not to be considered.[3]

§ 128. **Facts which are merely evidential should not be pleaded.**— Section 615[4] provides that a party shall not be required to state evidence in his pleading, nor to disclose therein the means by which he intends to prove his case; and section 610[1] requires that only the substantive facts necessary to constitute the cause of action or defense shall be stated. It is therefore neither necessary nor proper to state in a pleading the facts and circumstances by which the ultimate fact relied upon is to be proved.[5] In an action against a railroad company for personal injuries suffered by an employee, one of the defenses interposed was that plaintiff received his injuries in consequence of a violation by him of the rules of the company. The averment of the answer was as follows: "Defendant says that plaintiff received the injury complained of in consequence of going between the cars while in motion for the purpose of uncoupling them, in violation of his duty and of the rules and regulations of the defendant in that behalf made and provided." Defendant offered in evidence one of its rules which related to the manner of coupling and uncoupling cars, but the trial court excluded it upon the ground that it was not admissible under the pleading. The supreme court held that this ruling was erroneous in view of the provisions of the two sections above cited.[6] It is not necessary in an action to recover for goods sold to a firm that the petition

[1] Clack v. Southern El. Supply Co., 72 App. 506.

[2] State ex rel. v. Pace, 34 App. 458. See also § 130, *post*.

[3] Carondelet Gas Light Co. v. Pratt, 7 App. 573.

[4] Rev. Stat. 1899.

[5] See v. Cox, 16 Mo. 166; Han. & St. Jos. R. Co. v. Kenney, 41 Mo. 271; Murphy v. Price, 48 Mo. 247, 250; Alexander v. Campbell, 74 Mo. 142; Planet Co. v. St. Louis, O. & C. R. Co., 115 Mo. 613; Van Hoozer v. Van Hoozer, 18 App. 19; McNees v. Mo. Pac. R. Co., 22 App. 224.

[6] Alcorn v. Chicago & Alton R. Co., 108 Mo. 81.

should allege that the defendants were partners. It is sufficient to charge that the goods were sold to defendants, and in proof of this averment plaintiff may show that the defendants were partners, and that the purchase was made by one of the partners for the benefit of the firm; and it is immaterial that the partner making the purchase is not joined as a defendant.[1] And the same principle applies where the action is based upon a promissory note which was executed by a party for the firm of which he was a member and to which the defendants belonged.[2] So, where the averment is that defendant purchased, it may be shown that the purchase was made by an authorized agent.[1] In an action on an account stated, an allegation that the account was presented to defendant by plaintiff, and was, after some months, returned without objection, is the statement of facts which are merely evidential.[3] It is not necessary in pleading the right to an exemption to set out the facts constituting the party the head of a family.[4]

**§ 129. Extent of this rule.**— The rule that evidence is not to be pleaded has been carried so far that if a statute of another state or the ordinance of a city is not the basis of the cause of action, but is merely evidentiary, it need not be pleaded.[5]

**§ 130. The rule applies in an action for conversion.**— Where plaintiff sues for the conversion of his property by the defendant, the fact of the conversion must be directly alleged in the petition; it is not sufficient to allege it inferentially or to state facts which constitute the evidence of the conversion.[6]

[1] Gates v. Watson, 54 Mo. 585.

[2] Lessing v. Sulzbacher, 35 Mo. 445.

[3] Brown v. Kimmel, 67 Mo. 430, 432. And see, in this connection, McKeen v. Boatmen's Bank, 74 App. 281.

[4] Duncan v. Frank, 8 App. 286.

[5] Banchor v. Gregory, 9 App. 102; Senn v. Southern Ry. Co., 135 Mo. 512.

[6] Perry v. Musser, 68 Mo. 477.

## CHAPTER VII.

### SAME SUBJECT — CONCLUSIONS OF LAW SHOULD NOT BE ALLEGED.


§ 131. Facts are to be pleaded as distinguished from conclusions.
132. The rule applies to the pleadings of both parties.
133. Pleading compliance with a statute.
134. Declaring on a written instrument.
135. Some exceptions to the rule.
136. A violation of the rule may be waived.
137. Pleading conclusions of law — Illustrations.
143. Pleading the legal effect.
§ 144. The rule applied to written instruments.
145. The decision in *Estes v. Shoe Company* considered.
151. Pleading fraud or illegality.
152. Pleading fraud, etc.— Cases examined.
154. Further rules as to pleading fraud.
155. The rule applies equally to petitions and answers.
157. The rule applies equally to equitable and legal causes.
158. Pleading fraud — Illustrations.
161. Objection may be waived.


**§ 131. Facts are to be pleaded as distinguished from conclusions.**— The underlying theory of the practice act is that facts, and not conclusions of law, should be pleaded. The statute provides that neither presumptions of law nor matters of which judicial notice is taken need be stated in a pleading.[1] It further provides that no allegations shall be made in a pleading which the law does not require to be proved, and only the substantive facts necessary to constitute the cause of action or defense are to be stated.[2] This last provision necessarily excludes from pleadings all mere legal fictions, for such fictions require no proof and cannot be traversed.[3] It will be presumed that a duly incorporated college of medicine has power to issue diplomas; therefore in a proceeding which involves this right the power need not be specifically alleged.[4] As courts take judicial notice of their own records, an amended petition need not contain any averment as to the day upon which the original petition was filed, though the fact of filing it on such day be an essential ele-

[1] Rev. Stat. 1899, sec. 632.
[2] Rev. Stat. 1899, sec. 610.
[3] Gould on Plead. (4th ed.), p. 48.
[4] State ex rel. v. Gregory, 83 Mo. 123, 132.

ment of the right of recovery.[1] Facts must be stated as distinguished from conclusions of law.[2] And it has been held (in a case, however, in which the full decision does not appear) that the averment that there was a total failure of consideration is the statement of a conclusion of law.[3] Even where the action is based upon items properly recoverable in an action at law, the petition must show the facts upon which the cause of action is based.[4] And this is especially true where the suit is one in equity. Thus, where plaintiff sues for the net losses upon two joint adventures between himself and defendant, he must set up the facts which show the nature and result of the adventures, that the plaintiff has settled up all the transactions connected with the ventures, that there has been a loss and the amount of such loss.[4] It is said in a case decided soon after the adoption of the practice act that "perhaps the greater portion of the matters stated in pleadings are the legal results of what actually occurred, rather than the occurrences themselves as they transpired. And this is so much the case that it has been said these ultimate results are the true issuable facts and constitute the only proper object of averment in pleading."[5] But this view utterly ignores the fundamental change which the Code is designed to effect.

**§ 132. The rule applies to the pleadings of both parties.**— In *Kerr v. Simmons*[6] it is said that the effect of the practice act is to abolish general averments stating conclusions of law in a petition or answer.

**§ 133. Pleading compliance with a statute.**— The St. Louis court of appeals has decided that a general averment of compliance with the requirements of a statute states a conclusion of law and is bad pleading.[7] But the petition passed upon in that case was one in *mandamus*, and no reference is made in the decision to section 633,[8] which provides that in pleading a statute, public or private, it shall be sufficient for the party to allege that the act was done by the authority of such statute, or contrary to the provisions thereof, referring in some general terms to its subject-matter.[9]

[1] Barth v. Kansas City El. R. Co., 142 Mo. 535, 548.

[2] Story v. American Ins. Co., 61 App. 534; Kansas City v. Johnson, 78 Mo. 661. See also § 173, *post*.

[3] German Bank v. Mulhall, 8 App. 558.

[4] Scott v. Caruth, 50 Mo. 120.

[5] Edgell v. Sigerson, 20 Mo. 494, 497.

[6] 82 Mo. 269, 275.

[7] State ex rel. v. Hudson, 13 App. 61.

[8] Rev. Stat. 1899.

[9] See also § 121, *ante*.

§ 134. **Declaring on a written instrument.**— The above rule does not require the setting out in full of written instruments. In declaring on such instruments it is sufficient to set out their legal effect.[1]

§ 135. **Some exceptions to the rule.**— There are cases in which the statute expressly provides that the statement of a mere conclusion of law shall be sufficient. Thus in ejectment plaintiff is only required to state that on a certain day he was entitled to the possession of the premises in question, and that, being so entitled, defendant afterwards entered into such premises, and unlawfully withholds from plaintiff the possession of them.[2] Under the decisions of our courts replevin is another such action, since it is only necessary for plaintiff to state that he is the owner and entitled to the possession of the personal property described.[3] There is also an apparent exception to the above rules in the pleading of city ordinances, it being sufficient to allege that an ordinance was "duly passed." So, too, if an act can be lawfully done by a city only in pursuance of an ordinance, an averment that the act was done by the city is sufficient, without setting forth the adoption of the ordinance authorizing the act.[4]

§ 136. **A violation of the rule may be waived.**— Though the statement of a legal conclusion is bad pleading, and cannot stand if attacked in time, yet it may be good if the objection to it is not raised until after verdict, for the statement of a legal conclusion which presents the real point in controversy will be regarded as sufficient after verdict.[5]

§ 137. **Pleading conclusion of law — Illustrations.**— The averment that a conveyance was fraudulent is not the statement of a fact.[6] So an averment in an action of trespass that plaintiff was entitled to the exclusive possession of the premises is not the statement of a fact but of a conclusion of law.[7] On the other hand, a petition in an action for alienating the affections of plaintiff's husband, which states that defendant wrongfully

[1] Muldrow v. Caldwell, 7 Mo. 563; Moore v. Platte, 8 Mo. 467. This point is fully considered in § 144 *et seq.*

[2] Rev. Stat. 1899, sec. 3058; Loehr v. Murphy, 45 App. 519.

[3] Martin v. Block, 24 App. 60; Benedict Mfg. Co. v. Jones, 60 App. 219; Loehr v. Murphy, 45 App. 519; Dillard v. McClure, 66 App. 488.

[4] See §§ 170–172, *post.*

[5] Jackson v. St. Louis, I. M. & S. R. Co., 80 Mo. 147. Consult also ch. XXXVIII.

[6] Dannan v. Coleman, 8 App. 595. The method of pleading fraud is considered in § 151 *et seq., post.*

[7] Garner v. McCullough, 48 Mo. 318.

enticed, influenced and induced the husband to live separate and apart from plaintiff, thereby depriving and intending to deprive her of his affection, comfort, society and support, is not objectionable as stating merely legal conclusions.[1] A petition in equity to set aside certain deeds contained an allegation that certain parties were served by publication issued on a *non est* return, and that the order of publication was wholly unauthorized. It was held that the latter affirmation, being a mere conclusion of law, must be disregarded, and that, therefore, the petition admitted that the order of publication was made on a return of not found, and was for that reason valid.[2] The allegation that defendant, as sheriff, "wrongfully and illegally sold all of such property, which was worth $2,500, to satisfy such execution, which was only for $27 and costs," states merely a conclusion of law, and is not a statement of any fact as to the character or manner of the sale.[2]

§ 138. Where it is alleged that while plaintiff was in the employ of defendant he was required by defendant to work in a place which was rendered unsafe and dangerous by reason of certain negligent acts and doings of men engaged in repairing defendant's factory, in consequence of which he was injured, the petition is sufficient. Whether this constituted a breach of defendant's duty is a conclusion of law, which plaintiff is not required to plead.[3]

§ 139. In a mechanics' lien suit the plaintiff alleged that his demand became due on a day specified, and that within four months thereafter he filed his account for a lien. This was an allegation of a matter of fact, and not a mere conclusion of law, and unless controverted by the answer it stood admitted.[4]

§ 140. It is sufficient to state that a party is the head of a family, without setting out the facts which in law would constitute him such.[5]

§ 141. In a bill for an injunction a mere allegation that irreparable injury will ensue from the acts complained of is not sufficient; traversable facts must be stated in the bill, which show that plaintiffs have not an adequate remedy at law, or that the injury cannot be compensated by an action for damages as such.[6]

[1] Nichols v. Nichols, 134 Mo. 187.
[2] Schiffman v. Schmidt, 154 Mo. 204.
[3] Sackewitz v. American Biscuit Co., 78 App. 144.
[4] Henry v. Hinds, 18 App. 497.
[5] State to use v. Hussey, 7 App. 597; Duncan v. Frank, 8 App. 286.
[6] State ex rel. v. Wood, 155 Mo. 425.

§ 142. Where the defense is usury, an answer is not good which simply alleges that usurious interest was taken; the facts constituting the usury must be stated.[1] In an action on the bond of a public administrator the answer averred that an application had been made by the surety for his discharge, and that such application was made "after due notice as required by law." The answer then set out the record of the proceedings upon the hearing of the application, which record contained the recital that the principal was present. It was held that the notice was sufficiently pleaded.[2]

§ **143. Pleading the legal effect.**— In a case decided very soon after the adoption of the practice act, it was held by Judge Scott that it is not necessary under the Code that the facts should be pleaded according to their legal effect, but that the facts may be stated as they really occurred. The case was one to recover damages against defendant, who had aided and abetted one Edwards in an assault on plaintiff. Under the common law, since all were principals in an assault and battery whether they actually struck the blow or only stood by aiding or counseling the act, the petition would have been bad. But it was held good under the Code.[3] It is again said in *Alexander v. Campbell*,[4] that facts are required to be stated, not the legal effect of those facts. In *Thomas v. Concordia Cannery Co.*,[5] which was an action to recover damages for a nuisance, the petition contained no averment that the acts complained of were done either negligently, unlawfully, maliciously, knowingly or wrongfully. Defendant objected that the petition did not state a cause of action. But the court held that it was not necessary to charge that the acts were unlawfully or wrongfully done; that it was only necessary to allege the substantive facts which the law would say were unlawful or wrongful, and that whether or not the acts complained of constituted a nuisance, and were therefore unlawful or wrongful, was a question of law to be passed on by the court. (p. 358.) The question again arose in *Duff v. Fire Association*,[6] which was an action upon an oral contract for insurance, and it was urged

[1] Davis v. Tuttle, 10 Mo. 201; Bond v. Worley, 26 Mo. 253.

[2] State ex rel. v. Nolan, 99 Mo. 569.

Consult also § 143 *et seq., post.* That conclusions of law cannot be pleaded in a suit for divorce is shown in ch. XV, § 383.

[3] Page v. Freeman, 19 Mo. 421. And a case in which the same position is taken is that of Goetz v. Ambs, 27 Mo. 28.

[4] 74 Mo. 142.

[5] 68 App. 350.

[6] 129 Mo. 460.

that plaintiff must set out in his petition the contract as the law would imply it in case the written policy had been issued. In holding that such course need not be pursued, the court says: "The facts raised by mere legal implication cannot, under our sytem of pleading, be considered constitutive facts necessary to be averred in order to state a cause of action. Such constitutive facts are the actualities of the transaction. A legal implication from those actualities of other facts may authorize the use of such implied facts to defeat a recovery, but it cannot be essential to the statement of the cause of action, which arises, if at all, upon the statement of the actual facts." (p. 466.) In an action upon a judgment an allegation that the judgment remains valid and in full force is equivalent to an allegation that it remains unpaid.[1]

§ **144. The rule applied to written instruments.**— In declaring upon a written instrument or contract it is not necessary to set it out in precise and identical terms, but it will be sufficient if it is pleaded according to its legal meaning and effect.[2] By this is intended that it is sufficient if the petition states concisely and in ordinary language what the general effect of the written agreement is. But where an action is brought upon a promissory note against an indorser, it seems that it is not sufficient to aver merely that the note was a negotiable note, but the facts must be set out from which the court may see that it is negotiable;[3] though there is one case which holds to the contrary.[4] Where the petition sets out the drawing and negotiation of a bill of exchange described therein, and states that the legal effect thereof is an assignment by the drawer to the payee of an indebtedness of the drawee to the drawer, this does not tender an issue of fact as to whether the assignment was such that the assignee might sue as the sole owner of the fund.[5] The ground of this decision is that the mere drawing and delivering of a bill of exchange is not of itself a transfer of the debt due to the drawer by the drawee; to show such an assignment an intention to assign must appear. But the allegation of certain evidential facts, coupled with the statement that there was an assignment

[1] Wise v. Loring, 54 App. 258.

[2] Jones v. Louderman, 39 Mo. 287.

[3] Townsend v. Heer Dry Goods Co., 85 Mo. 503; Hart v. Harrison Wire Co., 91 Mo. 414; Jacobs v. Gibson, 77 App. 244.

[4] Bateson v. Clark, 34 Mo. 31. See § 147, *post.*

[5] Bank of Commerce v. Bogy, 9 App. 335.

of the fund and an intention to assign it, will not make a good petition, nor enable the payee of the bill to recover as upon an equitable assignment, where such bill has not been accepted by the drawee. The mere statement of the legal conclusion does not help the petition.[1]

**§ 145. The decision in Estes v. Shoe Company considered.** In a very recent case it is declared by one of the judges of the supreme court that it is not only allowable to plead a contract according to its legal effect, but that it must be so pleaded; and unless it is so pleaded, the pleading is demurrable.[2] The writer of the opinion in that case went so far as to assert that, if a contract is set out in the petition *in hæc verba*, the petition is bad on demurrer. He says: "The rules of good pleading *require* that the instrument relied on should be pleaded by its legal effect, which requirement is not for mere form, but rests on substantial reason. The pleading is addressed to the court, and should state the pleader's theory of his case, not leaving it to the court to construct a theory as best it may from the evidence set out, and not leaving his adversary in the dark as to what the theory advanced is, or what construction the pleader puts upon the contract." (p. 583.) The decision of this point was unnecessary to the determination of the case,[3] and what is said in this connection must therefore be considered a *dictum;* and, as such, it is certainly entitled to "that respect which is due to the writings of a learned and impartial lawyer."[4] But it has been said by the supreme court that, in order that a decision may operate as a binding authority, "the question must have been fairly presented to the court as necessary to a decision in the case, and directly considered and decided."[5] And it is added that such opinion is not conclusive upon questions which are merely collateral to the matter actually considered.[5] The court of appeals also holds that an appellate court is concerned only with what has been actually decided in earlier cases, and not with the arguments or illustrations used in the opinion.[6]

[1] Some further authorities on this point will be found in chapter XIII. See § 285.

[2] Estes v. Desnoyers Shoe Co., 155 Mo. 577. The same judge reiterates this rule in Anderson v. Gaines, 156 Mo. 664, 669.

[3] This is true also of the second case in which the rule is announced.

[4] Mapes v. Burns, 72 App. 411.

[5] Gwin v. Waggoner, 116 Mo. 143, 152.

[6] State to use v. Koch, 47 App. 269.

§ 146. I have urged this point and cited these authorities because the above *dictum* is a radical departure from the spirit, as well as from the letter, of the Code. For if plaintiff *must* plead the contract, not as it actually is, but according to its legal effect, is this not pleading a conclusion of law? I apprehend it is the duty of the court to construe the written instrument which is set out *in hæc verba*, and to construe it regardless of what plaintiff thinks its legal effect to be, or whether he rightly or wrongly apprehends its effect.[1] The learned judge says that the petition should state the pleader's theory of his case, and not leave it to the court to construct a theory. But is it not the province of the court to correctly construe the contract, whatever the pleader's theory of it may be? And if the pleader has entirely mistaken its legal effect, yet, if he has set forth in his petition facts showing that there has been a breach of the contract which he has pleaded *in hæc verba*, when that contract is properly construed, is it not the duty of the court to grant to plaintiff the relief to which he is entitled, whatever may be the pleader's theory of the meaning of the instrument?[2] If not, it is fair to ask what advantage the code system possesses over its predecessor. The very object of the new system, as is shown by the almost universal consensus of opinion at this day, is to remove the danger to the litigant resulting from a mistake which his counsel might make in stating the legal effect of the facts constituting his cause of action, whether those facts are written documents or matters resting in parol. If pleading in Missouri is to be controlled by common-law rules, litigants are in as pitiable a condition as before the adoption of the Code. For, under the rule of the common law, if the pleader makes a mistake in stating the legal effect of the contract, it is a fatal variance, since the court cannot give judgment for the pleader in opposition to his own averments.[3] Mr.

[1] See, in this connection, Payne v. Snell, 4 Mo. 238.

[2] In two cases, at least, our courts have so held. State ex rel. v. Williams, 77 Mo. 463, and State ex rel. v. Pace, 34 App. 458. There is also a remark of Judge Lewis, when he was presiding judge of the St. Louis court of appeals, which is worthy of remark. "Every question," he says, "must be tested by the real record of the cause, and not by an unauthorized understanding of its purport." Sumner v. Tuck, 10 App. 269, 279.

[3] Gould on Pleading (4th ed.), p. 146. It may not be improper to say in this connection that in the year 1873 a series of articles upon the English Judicature Bill appeared in the London *Saturday Review*. In one of those articles (which was published in the *Review* of April 12, 1873), the writer contrasts the common-law method with what is substantially the code of

Gould, in explaining that at common law facts only are to be pleaded, says that it is necessary in pleading to state nothing but facts, "nothing but facts as they really exist, or are by legal fiction or presumption deemed to exist."[1] But these fictions, he adds, "require on the one hand no proof, and on the other they cannot be traversed." (p. 48.) Therefore, if in Missouri the plaintiff does state his theory of the law, such statement is not traversable, and no issue can be made on it. This is so well stated by Mr. Pomeroy that I quote from his work. Speaking of the new procedure, he says: "The issuable facts in a legal action, and the facts material to the relief in an equitable suit, should not only be stated to the complete exclusion of the law and the evidence, but they should be alleged as they actually existed or occurred, and not their legal effect, force or operation. . . . Rejecting as it does the technicalities, the fictions, the prescribed formulas, and the absurd repetitions and redundancies, of the ancient common-law system, the new pleading radically differs from the old in no feature more important and essential than this, that the allegations must be of dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely to the courts."[2] To this I need only add that the legal effect of a fact is not a fact; and it is a contradiction in terms to call it so.

§ 147. It will be instructive to consider briefly the former decisions of the Missouri courts bearing on this question. In *Jaccard v. Anderson*,[3] plaintiff pleaded the note sued on according to its legal effect, alleging that defendant, "by his negotiable note," promised to pay, etc. It was held that this was a statement of a mere conclusion or opinion of the pleader, and not the averment of a fact upon which issue could be taken. The same ruling was made in two subsequent decisions.[4] It is true that there is one decision to the contrary.[5] But that case by no means

the American states, and says: "The first striking difference is this: that on the common-law plan a plaintiff is required to state, not the facts, but what he considers to be the legal effect of the facts;" and he pointedly adds that, if his advisers take a wrong view of a doubtful point, the plaintiff loses, not because he is not entitled to recover, but because he has not put his case as wisely as he might have done.

[1] Gould on Pleading (4th ed.), p. 43.

[2] Pomeroy, Rem. & Rem. Rights, sec. 529.

[3] 32 Mo. 188.

[4] Lindsay v. Parsons, 34 Mo. 422; Simmons v. Belt, 35 Mo. 461.

[5] Bateson v. Clark, 37 Mo. 31.

holds that it is bad pleading to set out the instrument *in hæc verba*. All it does hold is that it is not necessary to so set it out. Moreover, the case of *Bateson v. Clark*,[1] which apparently overrules the earlier cases, has not been followed. For in two quite recent cases the earlier cases are approved.[2] Those cases are also followed by the court of appeals.[3] And while *Bateson v. Clark*[1] has been repeatedly cited on other points, I do not find that it has ever been followed as to the point in question.

§ 148. The learned judge who wrote the opinion in the case under consideration does not notice the case of *State ex rel. v. Williams*,[4] where the supreme court holds that it is sufficient to set out the contract *in hæc verba*. In that case it is said that the "legal effect" of a bond is pleaded if the condition of the bond is set out *in hæc verba*. It is true the court suggests that the petition in that case might have been more specific. But that remark has reference solely to the allegations concerning the breach, and not to those as to the condition of the bond. The case is followed by the Kansas city court of appeals.[5] In *Blaine v. Knapp*,[6] plaintiff not only set forth in his petition *in hæc verba* the contract sued on, but also stated his understanding of its legal effect. If the reasoning of the learned judge in the case now under discussion is correct, a demurrer to that petition would have necessarily admitted plaintiff's construction (theory) of the contract. But the court there expressly holds that such is not the result of a demurrer; it says: "The averments as to the meaning of the contract are not admitted by the demurrer; that is a question for the court. Facts and not conclusions of law are admitted by a demurrer." (p. 248.) And the court proceeds to construe the contract and to state what is its legal meaning. And in a still later case the court says: "It is the facts, not the conclusions of the pleader, which are admitted" by a demurrer.[7]

[1] Bateson v. Clark, 37 Mo. 31.

[2] Townsend v. Dry Goods Co., 85 Mo. 503, and Hart v. Harrison Wire Co., 91 Mo. 414.

[3] Jacobs v. Gibson, 77 App. 244.

[4] 77 Mo. 463.

[5] Harkness v. Jones, 71 App. 289; Jacobs v. Gibson, 77 App. 244. Also in the case of an indorsement of waiver. Hammett v. Trueworthy, 51 App. 281.

[6] 140 Mo. 241.

[7] Knapp v. St. Louis, 153 Mo. 560, 572; and when this case came before the other division of the supreme court (see 156 Mo. 352), that division asserted the same doctrine. In Stoddard v. Tredwell, 26 Cal. 294, the petition not only set out the contract *in hæc verba*, but also contained a statement of its legal effect according to the views of the pleader. It was held that, if the construction put by the pleader upon the terms of the contract, which was

§ 149. If the *dictum* in the *Estes* case is to become the law of this state, then pleaders under the Code will be held to a more rigid adherence to technicality than were the practitioners under the common law. For at common law it was sufficient to set out the contract sued on *in hæc verba*. "In actions *ex contractu*," says Mr. Gould, "the declaration must distinctly state the nature and essential parts of the contract, *either in the terms of it* or in substance and according to its legal effect, together with the breach."[1] And Judge Bliss, speaking of the rule at common law, says that the pleader was not under an imperative obligation thus to plead, for it was always sufficient to set forth the very words of the instrument, and if it was so pleaded *the court would judge of its legal effect.* And he adds: "The pleader will be allowed to give it *in hæc verba*, for that would be a statement of the facts, and the whole matter would be before the court."[2]

§ 150. I cannot better close the discussion of this case than by using the words of Sherwood, J., in *Hoester v. Sammelmann:*[3] "If the facts are stated, the legal conclusion follows as night follows day, and so no statement of what conclusion the law draws is necessary." (p. 624.)

§ **151. Pleading fraud or illegality.**— In view of the above rule forbidding a statement by the pleader of conclusions of law, the question has frequently arisen as to the proper method of pleading fraud or illegality. And it is now settled, in this state at least, that where fraud is the ground of the action, plaintiff must allege all the circumstances essential to the support of the charge with such certainty that defendant may know what he is called upon to answer.[4] There is one decision of the court of appeals in which a distinction is drawn between contracts which are rendered voidable by reason of fraud and those which are absolutely void; and it is held that if the fraud is such as to render the agreement void *ab initio*, it need not be set up in the answer, but may be proved under a general allegation; but that, on the other hand, if the contract is only voidable and not void, it is necessary to plead specially the circumstances of the fraud.[5]

thus set out *in hæc verba*, was a false one, such wrong construction would not render the petition bad, but the averments as to the legal effect of the contract would be regarded as surplusage.

[1] Gould on Pleading (4th ed.), p. 169.

[2] Bliss, Code Pleading, sec. 158.

[3] 101 Mo. 619.

[4] Duffy v. Byrne, 7 App. 417. That the rule also applies to answers will be shown later. See §§ 152, 155, *post.*

[5] White v. Middlesworth, 42 App. 368.

This ruling is based upon the principle of law that where a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must be specially pleaded; but if the cause of action alleged never existed, because it was so tainted with fraud in its inception as to be absolutely void, then the defense may be made under a general denial.[1] This position is supported by several decisions of the supreme court.[2] The principle is the same where a contract is vitiated by reason of illegality or immorality. Where the illegality appears from the contract itself, it may be shown under a general denial. But if such illegality does not appear from the contract itself or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter, and must be pleaded in order to be available.[3] The decision above referred to[4] is by the Kansas City court of appeals. More recently the St. Louis court of appeals has rendered a decision to the same effect, holding that in an action on a writing it may be shown under a general denial that the signature of the defendant was procured through the secret and fraudulent substitution of the writing in place of another, which the defendant supposed he was signing.[5]

**§ 152. Pleading fraud, etc.— Cases examined.**— In *Edgell v. Sigerson*,[6] decided in 1855, the answer alleged that certain words were "fraudulently inserted" in a certain note after its execution by the holder, and also alleged that a certain judgment was "obtained by fraud and by perjury committed on the trial." This answer was held by the supreme court to sufficiently plead fraud, the court saying: "Under the former system it was sufficient to state this matter in this general form. Fraud usually consisting of a great multiplicity of facts and circumstances, it was found by experience highly inconvenient, if not quite impracticable, to set them forth with particularity, and hence this general mode of stating this matter of defense forced itself into use and was approved by the courts; and we see no reason for holding otherwise under the new code." (p. 496.) In 1870 the supreme court

[1] Of course, if the fraud can be shown under a general denial, that is equivalent to saying that the facts constituting the fraud need not be set out.

[2] Greenway v. James, 34 Mo. 326; Corby v. Weddle, 57 Mo. 452, and others.

[3] Kansas City School District v. Scheidley, 138 Mo. 672; McDearmott v. Sedgwick, 140 Mo. 172.

[4] White v. Middlesworth, 42 App. 368.

[5] Kingman v. Shawley, 61 App. 54.

[6] 20 Mo. 494.

adheres to this view, and says that it is sufficient to allege fraud generally, without going into its history and details.[1] But the decision in that case apparently limits the doctrine to cases in which fraud is set up as a defense. In *Plant Seed Co. v. Michel Plant & Seed Co.*,[2] decided in 1886, the question came up on an allegation of fraud in the petition, and the court held that the defendant's fraud is sufficiently well pleaded, because under our practice act a general allegation of fraud is sufficient. The two preceding cases are cited as authority, the court adding: "Nor is it conceivable how a fraudulent intent and motive is capable of a more specific designation than a mere statement." (p. 586.) But that the extension of this rule to the stating of a cause of action does not now meet the approval of the supreme court appears from its decision in *Clough v. Holden*,[3] in which it is held that in an action on a note a general allegation in the answer that the note was procured by fraud is sufficient, citing the *Edgell* case,[4] among others, as authority. But the court goes on to say: "It may be as well to remark that the case of *Edgell v. Sigerson*[4] (and others mentioned) have never been overruled, but they only held that pleas of fraud in general terms were good in an answer, and that the fraud charged referred only to matters stated in the petition. The bare allegation of fraud has never been sustained as sufficient under our code, either in law or equity. We have always required the facts constituting the fraud to be averred. A satisfactory reason for the distinction between an answer or other pleading and a petition in this respect would be hard to give. The writer will not attempt one." (p. 353.)

§ 153. In 1883 the question was again before the supreme court in a case in which it was alleged in the petition that an allowance in the probate court was procured by fraud, and the language of the pleading was quite similar to that used in *Edgell v. Sigerson*, above cited;[4] the averment being that "the allowance was procured by the fraudulent representation that the note was valid." The supreme court held that this allegation was but a conclusion of law and was insufficient.[5] In the case of *Hoester v. Sammelmann*,[6] decided in 1890, the petition charged that defendant, "intending to cheat and defraud plaintiff," did certain acts. The court, speaking through Sherwood, J., says:

[1] Fox v. Webster, 46 Mo. 181. See also Goodson v. Goodson, 140 Mo. 206.
[2] 23 App. 579.
[3] 115 Mo. 336.
[4] 20 Mo. 494.
[5] Smith v. Sims, 77 Mo. 269.
[6] 101 Mo. 619.

"General allegations of fraud, or other general allegations, no facts being stated, are but legal conclusions, and for that reason insufficient. To say that a man acted fraudulently or improperly, without specifying what he did, is equivalent to making the pleader the sole judge of the sufficiency of his pleadings and substituting his judgment for that of the court. If the facts are stated, the legal conclusion follows as night follows day, and so no statement of what conclusion the law draws is necessary." (p. 624.)[1] The decision of the case of *Mateer v. Missouri Pac. R. Co.*[2] did not turn upon the question whether fraud was properly pleaded, since the court held that there was no evidence of fraud warranting a submission of the case to the jury. But the language of the opinion was such as to show that the court did not consider fraud well pleaded, because there was no statement of any traversable fact constituting the fraud. And in commenting upon an instruction which had been improperly given for the plaintiff, Gantt, J., says: "This instruction well illustrates the vicious pleading which had stated no substantive fact upon which to hinge the charge of fraud. Of course, as no fraud was specified, when the court came to instruct it could not, as required by all correct practice, confine plaintiff to the tricks or artifices charged in the petition, but the jury were given a roving commission to scent out and find some artifice or trick, whether in the case or not. (p. 353.) In *Wood v. Evans*,[3] speaking of a charge of fraud in a petition, Smith, P. J., says: "The fraud should have been circumstantially stated, so that the court could see that the misrepresentation was of something material, constituting an inducement or motive to the act of plaintiff, and by which he was actually misled to his injury." (p. 233.)

**§ 154. Further rules as to pleading fraud.**— In pleading fraud it is not sufficient that the pleader alleges his belief in the existence of fraud; the fraud must be directly charged.[4] Thus, an allegation in a petition that plaintiff is informed and believes that a judgment debtor transferred his property to another for the purpose of defrauding and delaying his creditors is not sufficient.[5]

**§ 155. The rule applies equally to petitions and answers.**— The position was taken in some of the earlier cases that a general averment of fraud is good in an answer. (See § 152, *ante*.) But

[1] But such a petition may be good after verdict. Wilcoxson v. Darr, 130 Mo. 660.

[2] 105 Mo. 320.

[3] 43 App. 230.

[4] Wilkinson v. Goodin, 71 App. 394.

[5] Nichols-Shepard Co. v. Hubert, 150 Mo. 620.

this position has been abandoned, and our courts now follow the construction given to the Code by the courts of New York, from which state the Missouri Code was taken.[1] In the *Nichols* case,[1] the court says that logical and legal consistency require that an answer should as necessarily state the constitutive facts of the fraud relied on as that a petition should do so; adding, that there is as little reason for making a distinction in this regard between petitions and answers as there is for saying that a petition is not good in equity unless it sets forth the facts constituting the fraud, but that it may be good at law, since we have in this state but one form of action. In *First National Bank v. Rohrer*,[2] the charge of fraud appeared in the answer, and the allegation was that a certain mortgage was made with the intent to defraud, hinder and delay defendants and others as creditors of the mortgagor. This allegation was held insufficient even in an answer, and it is said that if defendants had purposed assailing the mortgage upon the ground of fraud, because of its having been withheld from record for a fraudulent purpose, such fact should have been alleged. So also in *Goodson v. Goodson*,[3] the charge of fraud appeared in the answer. Defendant, in order to escape the consequence of failing to collect a claim due the estate of which she was administratrix, alleged that she was prevented from taking proper proceedings against the debtor "by reason of his representations, action and fraudulent conduct, by which she was fraudulently induced to believe that he fully intended to settle with her."[4] This general allegation of fraud was held to be insufficient.

§ 156. It may therefore be considered as the settled law of Missouri that, in any pleading, whether a petition, an answer or a reply, a general allegation of fraud is not sufficient, but the facts constituting the fraud must be set out and detailed.[5] Indeed, this is one instance in which it would seem that the principles of the common law were perhaps more conducive to justice than those applied by the courts to the Code. For Chitty says, in his work on Pleading, that a release may be met by a plea of fraud or duress, "and," he well adds, "it is unnecessary and injudicious to state the particulars of the fraud."[6]

[1] See the cases cited in Nichols v. Stevens, 123 Mo. 118.

[2] 138 Mo. 369.

[3] 140 Mo. 206.

[4] This averment is quite similar to that in Edgell v. Sigerson, § 152, *ante*.

[5] The above rule as to pleading fraud applies equally to the pleading of duress, malice and kindred matters. See §§ 176, 177, *post*.

[6] 1 Chitty, Plead. (16th Am. ed.), p. 608.

**§ 157. The rule applies equally to equitable and legal causes.** It is sometimes urged that while in equity it is necessary to set forth the facts constituting the fraud, this is not required in an action at law. But, whatever may have been the rule before the adoption of the Code, there can be no question that since its adoption the rule is the same, whether the proceeding be one in equity or at law, since there is under the Code but one form of action. If fraud is necessary to be pleaded at all, there is as much necessity that the pleader should set forth the constitutive facts when asking for legal relief as there is when asking for equitable relief.[1]

**§ 158. Pleading fraud — Illustrations.**— In an action for deceit it is not necessary to charge that the false representations were made with intent to deceive; it is sufficient to state facts from which the intent may be inferred.[2] If the petition states that certain representations were made by defendant to plaintiff, that plaintiff relying on those representations was induced to make a certain purchase, and that such representations were false, it states a good cause of action.[3] Where a petition or answer challenges a settlement upon the ground of fraud or mistake, it must specifically set forth the fraud, the errors or mistakes complained of.[4] The allegation that defendant as sheriff "wrongfully and illegally sold all of such property, which was worth $2,500, to satisfy such execution, which was only for $27 and costs," states merely a conclusion of law, and is not a statement of any fact as to the character or manner of the sale.[5] On the other hand, an averment that the debts due from a mortgagor to the mortgagee were largely overstated, and that this was intentionally done to defraud or delay other creditors of the mortgagor, is not the statement of a mere conclusion of law but of a fact.[6]

§ 159. Where the basis of the action is that a defendant corporation fraudulently colluded with its president to convert stock belonging to the plaintiff, it is sufficient simply to aver that fact, without specifying the acts which constituted the fraudulent collusion.[7]

§ 160. In *Williams v. Chicago, S. F. & Cal. R. Co.*,[8] the rule is applied to a case where plaintiff charged that defendant's engi-

[1] Clough v. Holden, 115 Mo. 336, 353; Nichols v. Stevens, 123 Mo. 96, 118.
[2] Scott v. Haynes, 12 App. 597.
[3] Kenny v. James, 50 Mo. 316.
[4] Marmon v. Waller, 53 App. 610.
[5] Schiffman v. Schmidt, 154 Mo. 204.
[6] Whitehill v. Keen, 79 App. 125.
[7] Withers v. Lafayette County Bank, 67 App. 115.
[8] 112 Mo. 463.

neer, whose decision was by the terms of the contract to be conclusive upon the parties, fraudulently failed to make the necessary measurements, and it was there held that the facts constituting the fraud in the measurements, or in the failure to make them, must be set out. The rule is also held to apply to a bill in equity to set aside a conveyance because made in fraud of creditors.[1]

§ **161. Objection may be waived.**— The point that fraud is not well pleaded may be waived by the adversary party; and it is waived if no objection is raised until after verdict.[2]

[1] Reed v. Bott, 100 Mo. 62.

[2] Wilcoxson v. Darr, 139 Mo. 660.

## CHAPTER VIII.

### APPLICATION OF THE ABOVE RULES TO SPECIFIC ISSUES AND CAUSES.


§ 162. Pleading conditions precedent.
164. Pleading proviso or exception.
165. Pleading laws.
167. Pleading law creating municipal corporation.
168. Where the law has been amended.
169. Laws of another state.
§ 170. Pleading ordinance.
171. Mode of pleading ordinance.
173. Pleading powers of public officers.
174. Pleading ratification.
175. Pleading a judgment.
176. Pleading duress.
177. Pleading malice.


**§ 162. Pleading conditions precedent.**— Section 634[1] provides that in pleading the performance of a condition precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; if this allegation is controverted, the party pleading performance must establish at the trial the facts showing it. This provision applies only to contracts and to such conditions as are expressed in them. In pleading conditions imposed by law, an allegation of due performance does not tender an issue of fact. The rules respecting the mode of pleading conditions precedent other than in contracts are not substantially changed by the Code.[2]

§ 163. Where an act is to be done on the part of the plaintiff as a part of the contract, he must allege in his petition that he has performed it; but this rule does not apply to a mere incident of the contract.[3] A provision in a building contract that payment shall be made on the estimate and certificate of the architects is a condition precedent, and should be pleaded and its performance alleged and proved; but no special statement of facts showing the performance is necessary: the provisions of section 634 apply.[4] The rule laid down in section 634 does not, it seems, apply to proceedings for *mandamus*.[5]

[1] Rev. Stat. 1899.

[2] Parks v. Heman, 7 App. 14. See, however, §§ 165, 166, *post*.

[3] Owens v. Geiger, 2 Mo. 39.

[4] Roy v. Boteler, 40 App. 213. And the same rule is applied in a case involving the building of a railroad. Williams v. Chic., S. F. & C. R. Co., 112 Mo. 463.

[5] State ex rel. v. Hudson, 13 App. 61.

**§ 164. Pleading proviso or exception.**— A proviso in the nature of an exception embodied in the contract sued on must be set up in the petition, and the facts pleaded must show a liability consistent with such proviso.[1] In pleading a statute which defines an offense, if there is an exception so incorporated with the clause defining the offense that it becomes in fact a part of the description, it cannot be omitted in the pleading.[2]

**§ 165. Pleading laws.**— It is not necessary to set forth any statute, public or private, or any special matter thereof; but it is sufficient to allege that the act was done by the authority of such statute, or contrary to its provisions, naming the subject-matter of the statute, or referring to it in some general terms with convenient certainty.[3] And in pleading a private statute or a right derived therefrom, it is sufficient to refer to the statute by its title and the date of its passage; the court will then take judicial notice of it.[4] An averment that a tax was "duly levied" is equivalent to pleading the substance of the law under which it was levied, and is sufficient to authorize the reception of the law in evidence.[5]

§ 166. In pleading a public act, neither the title nor the date of its enactment need be recited.[6] But if the party who seeks to avail himself of the provisions of the statute refers to it merely by its title, he thereby makes the title material and must recite it correctly.[7] If the party desires to avail himself of the provisions of such a statute, he need only state the facts which bring his case clearly within its provisions.[8] Thus, the general school law makes all school districts corporations, and, in pleading, the act need not be set forth, since the court will take judicial notice of it.[9]

**§ 167. Pleading law creating municipal corporation.**— A public act creating a municipal corporation need not be pleaded, and an allegation that it is a corporation duly incorporated under and by virtue of a certain act is sufficient.[10] In an action against

[1] Brecheisen v. Coffey, 15 App. 80.

[2] State v. Elam, 21 App. 290.

[3] Rev. Stat. 1899, sec. 633.

[4] Rev. Stat. 1899, sec. 632; City of Mexico v. Cauthorn, 25 App. 285.

[5] Kansas City v. Johnson, 78 Mo. 661.

[6] Eckhert v. Head, 1 Mo. 593; Hance v. Wabash Western R. Co., 56 App. 476.

[7] Eckhert v. Head, 1 Mo. 593.

[8] Hance v. Wabash Western R. Co., 56 App. 476; Reynolds v. Chicago & Alton R. Co., 85 Mo. 90; Emerson v. St. Louis & Han. R. Co., 111 Mo. 161.

[9] School District v. Holmes, 53 App. 487.

[10] Rev. Stat. 1899, sec. 631; Nutter v. Chicago, R. I. & Pac. R. Co., 23 App.

a city, an averment that it is a corporation created and organized under the provisions of article V of chapter 30 of the Revised Statutes of 1889, sufficiently alleges that it was incorporated as a city of the fourth class.[1] And the rule applies to school districts.[2] A private act incorporating a town must be pleaded and proved, but need only be pleaded by its title and date of passage.[3]

**§ 168. Where the law has been amended.**— If delinquencies have been committed which authorize the collection of a penalty by any person moving in the matter, and they were committed before an amendment of the statute providing that only a taxpayer can maintain the action, but the action is not brought until after such amendment, the petition must show that the plaintiff possesses the qualifications required by the amended act.[4]

**§ 169. Laws of another state.**— The laws of a sister state must be alleged and proved like any other issue of fact; otherwise they will not be considered by the court.[5] And it is not sufficient to plead such a law by the number of the chapter in which it is found; its terms, tenor or effect must be set out.[6] This rule applies, however, only where the action or defense rests immediately on the foreign law, since in such case the law is a substantive fact. But where the law is merely evidentiary, and the action is not founded upon it, it need not be pleaded.[7] This modification of the rule applies also to the pleading of a city ordinance.[8]

**§ 170. Pleading ordinance.**— Where a party bases his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he must plead the ordinance.[9] In an action against a railroad company for an injury caused by its running its cars at an excessive rate of speed, if the action is based upon the theory that an ordinance regulating the rate of speed was violated, such ordinance must be pleaded.[10] Where

328; Bowie v. Kansas City, 51 Mo. 454; Chillicothe Savings Ass'n v. Ruegger, 60 Mo. 218.

[1] Eubank v. Edina, 88 Mo. 650.

[2] School District v. Holmes, 53 App. 487.

[3] O'Brien v. Wabash, St. L. & Pac. R. Co., 21 App. 12; Apitz v. Missouri Pac. R. Co., 17 App. 419; Harlan v. Wabash, St. L. & Pac. R. Co., 18 App. 483; State ex rel. v. Oddle, 42 Mo. 210.

[4] Barker v. Phelps, 39 App. 288.

[5] Garret v. Conklin, 52 App. 654; McDonald v. Bankers' Life Ass'n, 154 Mo. 618.

[6] McDonald v. Bankers' Life Ass'n, 154 Mo. 618.

[7] Banchor v. Gregory, 9 App. 102.

[8] Senn v. Southern Ry. Co., 135 Mo. 512.

[9] Mooney v. Kennett, 19 Mo. 551; Givens v. Van Studdiford, 86 Mo. 149.

[10] Nutter v. Chicago, R. I. & Pac. R. Co., 22 App. 328.

the cause of action is not based on the ordinance it is not necessary to plead it.[1] Thus, in actions based upon negligence, a municipal ordinance may be introduced as bearing upon that question, though not specifically pleaded.[2] In an action under section 2864[3] to recover the statutory penalty of $5,000 for the death of a person which was alleged to have been caused by the negligence of a street-car driver, the recital in the petition of a city ordinance regulating the running of street cars, and prescribing the duties of those in charge of them, together with an averment that the death was caused by a failure to observe this ordinance, is not the statement of a separate cause of action founded upon the violation of the ordinance, but the pleading of such violation as affording evidence of the driver's negligence, the consequence of which is fixed by the statute.[4]

§ 171. **Mode of pleading ordinance.**— A municipal ordinance cannot be pleaded by its title or the date of its passage, but must be set out in full.[5] It is only necessary, however, to set out the substance and effect of the ordinance.[6] It is generally sufficient to give its purport, and to state that it was duly passed by an authorized body, without setting it out in full or reciting in detail the steps preliminary to its passage,[7] unless such steps constitute the jurisdictional facts in proceedings where the jurisdiction of the court is special and limited.[8] It must be borne in mind, however, that municipal ordinances must be pleaded with certainty of description as to their subject-matter and effect.[9]

§ 172. In alleging that a city ordinance was duly passed, it is necessarily implied that all essential antecedent acts requisite to its legal enactment were done.[10] If the action is based solely on the failure to meet the requirements of certain ordinances of an incorporated city, and there is an omission of any averment as

[1] Robertson v. Wabash, St. L. & Pac. R. Co., 84 Mo. 119; Senn v. Southern R. Co., 135 Mo. 512; Banchor v. Gregory, 9 App. 102.

[2] Robertson v. Wabash, St. L. & Pac. R. Co., 84 Mo. 119; Judd v. Wabash, St. L. & Pac. R. Co., 23 App. 56.

[3] Rev. Stat. 1899.

[4] Senn v. Southern R. Co., 135 Mo. 512. But it is otherwise if the right of action is based on the ordinance. Nutter v. Chic., R. I. & Pac. R. Co., 22 App. 328.

[5] St. Louis v. Stoddard, 15 App. 173; Kansas City v. Johnson, 78 Mo. 665; Apitz v. Missouri Pac. R. Co., 17 App. 419; Heman v. Payne, 27 App. 481.

[6] Kansas City v. Johnson, 78 Mo. 665; Heman v. Payne, 27 App. 481; Moberly v. Hogan, 131 Mo. 19; State ex rel. v. Oddle, 42 Mo. 210.

[7] Heman v. Payne, 27 App. 481; Eyerman v. Payne, 28 App. 72.

[8] Heman v. Payne, 27 App. 481.

[9] Keane v. Klausman, 21 App. 485.

[10] Becker v. Washington, 94 Mo. 375.

to the charter of said city, the action cannot be maintained, unless the charter is made a public act.[1] If an action against a municipal corporation relates to an act which can be lawfully done only under an ordinance, an averment in the petition that the act was done by the municipality implies that it was done in pursuance of an ordinance.[2] Thus, where a city charter provides that no street grading can be ordered except by ordinance, and all courts are required by the state constitution and the charter itself to take judicial notice of the provisions of the charter, if the petition for the assessment of damages and benefits for changing the grade of a street alleges that a certain ordinance defining the limits within which private property had been or would be benefited by the grading of the street had been duly enacted, this constitutes an inferential averment of the passage of an ordinance for the grading of the street, and, though defective if specifically and timely attacked, is good on a motion in arrest, and perhaps as against a general demurrer.[3] And if the action is against the city for negligently changing the grade of a street, an allegation that the city raised the grade is equivalent to an allegation that it was raised in pursuance of an ordinance.[4]

§ **173. Pleading powers of public officers.**— The powers and duties of public officers need not be pleaded where they are prescribed by law.[5] Where the charter and ordinance of a city authorize certain officers to make contracts for street improvements, it is sufficient in an action on a special tax-bill if the petition contains an averment that the contract was duly awarded by these officers.[6] Where, in an action for damages brought by a city officer against the mayor for wrongfully and maliciously removing him from office, the petition contains an averment that by the city charter the defendant had power to remove from office for cause any person holding office under its charter, such an allegation is not a statement of fact, but is simply the averment of a legal conclusion.[7] In pleading the appointment of a guardian by the probate court, the facts conferring the jurisdiction need not be stated more fully than required by the statute governing such appointment; and no objection can afterward

[1] Wisdom v. Wabash, St. L. & Pac. R. Co., 19 App. 324.

[2] Stewart v. Clinton, 79 Mo. 603.

[3] St. Louis v. Lang, 131 Mo. 412.

[4] Werth v. Springfield, 78 Mo. 107.

[5] State ex rel. v. Gates, 67 Mo. 139. See § 175, *post*, for rule where officer has a special jurisdiction.

[6] Culligan v. Studebaker, 67 Mo. 372.

[7] Manker v. Faulhaber, 94 Mo. 430.

be made, where it is admitted on the trial that such appointment was duly made prior to the trial.[1]

§ **174. Pleading ratification.**— The party seeking the benefit of a ratification must plead it.[2] And if he relies on the ratification of an act which was originally unauthorized, he must count on the subsequent promise.[3]

§ **175. Pleading a judgment.**— In pleading a judgment of the circuit court, which is a court of general jurisdiction, it is not necessary to allege that the court rendered a valid judgment; an allegation that a judgment was rendered is sufficient.[4] Section 634[5] provides that, in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.[6] And this provision applies to the pleading of a judgment rendered by a justice of the peace.[7]

§ **176. Pleading duress.**— Under sections 151 *et seq.*, *ante*, it is shown that it is not sufficient to plead fraud or illegality in general terms, but that the facts constituting the fraud or the illegality must be set forth. A like rule applies in pleading malice, duress and similar issues. In pleading duress *per minas*, an allegation of threats, intimidation and overbearing persistency of the party is not sufficient; the nature of the threats and the fear of their execution must be alleged.[8]

§ **177. Pleading malice.**— Where the facts alleged are such as make out a case of malice, it is not necessary to use the word "malice" in describing the offense.[9] The rule applies in actions for slander.[10]

[1] Collins v. Trotter, 81 Mo. 275.
[2] Webb v. Allington, 27 App. 559; Ferneau v. Whitford, 39 App. 311.
[3] Noble v. Blount, 77 Mo. 235.
[4] Wickersham v. Johnson, 51 Mo. 313.
[5] Rev. Stat. 1899.
[6] Etz v. Wheeler, 23 App. 449.
[7] Musick v. Kansas City, S. & M. R. Co., 124 Mo. 544.
[8] Murdock v. Lewis, 26 App. 234.
[9] Lyddon v. Dose, 81 App. 64.
[10] Linville v. Rhoades, 73 App. 217.

## CHAPTER IX.

### CONSTRUCTION OF PLEADINGS.


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**§ 178. The statutory rules of construction.**—The cardinal principles which must govern the courts in the construction of pleadings are laid down in three sections of our statute. Section 591[1] provides that the sufficiency of pleadings is to be determined by the practice act. Section 629[1] requires that, in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties. Section 676[1] makes it the duty of the courts to so construe the provisions of law relating to pleading, and to so adapt the practice thereunder, as to discourage, as far as possible, negligence and deceit, to prevent delay, to secure parties from being misled, to place the party not in fault as nearly as possible in the same condition he would be in if no mistake had been made, to distinguish between form and

[1] Rev. Stat. 1899. See, in this connection, *post*, §§ 184 *et seq.*

substance, and to afford known, fixed and certain requisitions in place of the discretion of the court or judge. In view of these express statutory commands it seems unfortunate that the courts, in passing upon questions of form in pleading, and in construing pleadings, should have been at all governed by the analogies drawn from the common law.[1]

**§ 179. Cases under the statute.**— The rule of pleading under the Code is that, by taking the language in its plain and ordinary meaning, such an interpretation should be given to it as fairly appears to have been intended by the pleader.[2] While it may appear that the rules of pleading are technical and often strict, yet these rules do not rest alone on the arbitrary will of the lawmaker, but are founded in that sense of justice which recognizes the right of every party to a suit to require of his adversary a clear and unequivocal statement of his side of the case. If this right is demanded in due form and season, it must be heeded as a demand of justice, and it is no answer to say that the demand is technical. But, on the other hand, justice will not allow a party to lie in wait for his adversary, to take his chances on a verdict, and then, if it be against him, profit by the strict technicality of the science of pleading, if a liberal construction can obviate the objection.[3] Substance and not form is regarded; and the pleading must be construed to mean what fairly appears to have been intended by the pleader.[4] The language of the pleading must be construed with reference to the time and place of making its allegations.[5] Where the petition alleged that goods were sold and delivered between March 1st and April 28th, and such averment is not denied in the answer, a fair construction is that the sales and deliveries were continuous, commencing on March 1st and ending on April 28th.[6] If the statute of limitations is set up, and plaintiff replies that the facts upon which his cause of action is based were not discovered by him until within a certain time, this is a sufficient averment that they were discovered within that time.[7]

**§ 180. Liberal construction.**— The statute requires that pleadings shall be liberally construed with a view to substantial jus-

[1] See Stillwell v. Hamm, 97 Mo. 579, 585.

[2] Hickory County v. Fugate, 143 Mo. 71.

[3] Cobb v. Lindell R. Co., 149 Mo. 135; Oglesby v. Mo. Pac. R. Co., 150 Mo. 137.

[4] Padley v. Catterlin, 64 App. 629; Hood v. Nicholson, 137 Mo. 400.

[5] McMullen v. Missouri, K. & T. R. Co., 60 App. 231.

[6] Cantwell v. Massman, 45 Mo. 103.

[7] Bent v. Lewis, 15 App. 40.

tice between the parties.[1] And a pleading is to be taken in its plain and ordinary meaning, giving such an interpretation to it as fairly appears to have been intended.[2] Section 629[3] was not intended to relax the rules of pleading where their strict enforcement is fairly demanded; if the circumstances surrounding a case are such that a liberal construction of the pleadings is necessary to prevent a defeat of justice, then they should be so construed.[4] Thus, where one of the acts charged by a plaintiff to be negligent is not such negligence as defendant is liable for under the law, but defendant waits until after verdict before raising his objection, the objection will not then be heard, if by a liberal construction of the petition it is found sufficient to sustain the verdict.[5]

**§ 181. The rule of liberal construction applies to form but not to substance.**— The provisions of section 629,[6] as also of section 604,[6] providing what an answer shall contain, are substantially identical with corresponding sections in the New York Code of Procedure. It has been held in that state that the provision in relation to a liberal construction of the pleadings with a view to substantial justice between the parties extends only to matters of form, and does not apply to the fundamental requirements of a good pleading. Chief Justice Ruger says: "A construction of doubtful or uncertain allegations in a pleading which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning is no more allowable now than formerly; and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader."[7] Similar views abound in our own decisions.[8] A case decided by the supreme court of Wisconsin furnishes an illustration of the rule. In an action upon a promissory note, the payment of which was guaranteed by the defendant, the allegation of the petition was: "Yet the said makers of said note nor the

[1] Rev. Stat. 1899, sec. 629; Loehr v. Murphy, 45 App. 519; Foster v. Missouri Pac. R. Co., 115 Mo. 165; Overton v. Overton, 131 Mo. 559; Vogelgesang v. St. Louis, 139 Mo. 127; Kash v. Coleman, 145 Mo. 645.

[2] Warnick v. Baker, 42 App. 439; Mendenhall v. Leivy, 45 App. 20; Bricker v. Stone, 47 App. 530; Silcox v. McKinney, 64 App. 330; Law v. Crawford, 67 App. 150.

[3] Rev. Stat. 1899.

[4] Cobb v. Lindell R. Co., 149 Mo. 135.

[5] Oglesby v. Missouri Pac. R. Co., 150 Mo. 137. The reader should consult in this connection chapter XXXI.

[6] Rev. Stat. 1899.

[7] Clark v. Dillon, 97 N. Y. 370.

[8] See, among others, Sumner v. Rogers, 90 Mo. 324, 329; Huston v. Tyler, 140 Mo. 252; Hood v. Nicholson, 137 Mo. 400; Padley v. Catterlin, 64 App. 629.

said defendant have paid the same." It is plain that this is an allegation that the note had been paid. It is equally plain that the pleader has been guilty of a grammatical error, and that what he intended to say was that neither the makers nor the defendant had paid the same. It was accordingly held that the pleading should be construed as though the allegation did so read.[1]

§ 182. **Limit of the rule.**— While our courts have always given a liberal construction to pleadings under the Code, they have sternly set their faces against the attempt to sue on one cause of action and recover on another.[2]

§ 183. **The rule applies to answers.**— The rule applies also in the case of an answer. Thus, where the order of a township board for the opening of a road is pleaded as a justification to an action of trespass, such board, as it existed under the township organization law, being a tribunal of special jurisdiction, the pleader must aver specially the facts which authorized the board to make the order, or else state generally that the order was duly made.[3] The latter mode of averring the fact would not be good pleading were it not for the provision of section 634,[4] that, in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If the allegation is controverted, the party pleading it must then establish the facts showing the jurisdiction, just as would have been required had he pleaded such facts in full.

§ 184. **Construing pleading most strongly against pleader.** While a pleading is to be fairly interpreted when attacked by demurrer, doubtful and ambiguous expressions will be taken most strongly against the pleader.[5] Yet after the verdict the court will not construe the petition most strictly against the pleader, but it will be liberally construed with a view to substantial justice.[6] The general rule is, where the pleading is silent as to some fact or is ambiguous, it must be taken most strongly against the pleader; but this is not inconsistent with the rule that pleadings must be fairly construed so as to reach the real intention of the pleader.[7] Even where the pleading is assailed

[1] Gunn v. Madigan, 28 Wis. 158.

[2] McCormick v. Interstate Cons. Rap. Trans. Ry. Co., 154 Mo. 191. See also cases cited in note 8, p. 113.

[3] Robinson v. Jones, 71 Mo. 582.

[4] Rev. Stat. 1899.

[5] Blanke v. St. Louis-Sonora Mining Co., 35 App. 186.

[6] Oglesby v. Missouri Pac. R. Co., 150 Mo. 137.

[7] Loehr v. Murphy, 45 App. 519.

on demurrer the court should lean toward rather than against the pleader, in obedience to the modern rule of giving him the benefit of every reasonable intendment and presumption.[1] While doubtful allegations are to be taken more strongly against the pleader, yet a pleading is not to receive as against the pleader a harsh or stringent interpretation.[2] The rule will not authorize a forced or unnatural construction to be placed on the words used.[3]

**§ 185. How far this rule applies under the new system.**— Under the Code this rule obtains only in a modified degree. Section 629[4] provides that in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties. It has been already stated[5] that, in construing this section, the supreme court holds that the language of the pleading should be taken in its plain and ordinary meaning, and that such an interpretation should be given it as fairly appears to have been intended by the pleader.[6] Thus, when an admission is made in an answer, it includes the dates of the facts as alleged in the adverse pleading.[7] What is meant by the rule is that no presumptions are to be indulged in favor of the pleading.[8] And it is not the design of the Code that plaintiff should be compelled to carefully sift each denial of the answer, and to carefully compare it with each paragraph of the petition, in order to see what is admitted and what is denied. Whether the denial is general or special, it must be such that the issue is not left to surmise or conjecture. If the answer is so indefinite that it is difficult to determine what is admitted and what denied, it will be most strongly construed against the defendant, and plaintiff is not bound to file a motion to have it made more definite and certain.[9] It has been said by the court of appeals that the alle-

[1] Hood v. Nicholson, 137 Mo. 400.

[2] Noll v. Oberhellman, 20 App. 336.

[3] State ex rel. v. Horner, 10 App. 307.

[4] Rev. Stat. 1899.

[5] In § 180 *et seq.*

[6] An additional citation is Stillwell v. Hamm, 97 Mo. 579.

[7] Sumner v. Rogers, 90 Mo. 334.

[8] State ex rel. v. Central St. L. Ass'n, 14 App. 597.

[9] Snyder v. Free, 114 Mo. 360; Miller v. Chicago & Alton R. Co., 62 App. 252. In most of the code states it is held that it is the intention of the section (that section which corresponds to section 629 of the Missouri statute) to practically abrogate the common-law rule of interpretation, and to substitute for it the principle of a liberal and equitable construction. It would be foreign to the purposes of this work, even if lack of space did not forbid, to cite the authorities on this point in detail. The

gations of a pleading are to be taken within reasonable limits most strongly against the pleader.[1] This was a case where defendant was sued as one of two joint makers of a note which was executed at Louisville, Kentucky. The special defense set up was that the other joint maker resided in Louisville, and that he was fully discharged from liability on the note by the statute of limitations of that state. The answer, however, did not allege that the Kentucky statute was one which operated to extinguish the debt itself, and not merely to bar the remedy, and it was held that it must be assumed that the Kentucky statute was similar in effect to the Missouri statute, and that it operated upon the remedy merely, thus construing the pleading most strongly against the defendant. A similar decision by the supreme court is that of *Williams v. St. Louis & S. F. R. Co.*[2] That was a case, too, where the statute of limitations of another state was pleaded, but there it was alleged, as it was not in the preceding case, that the law of Kansas not only bars the remedy but extinguishes the right of action. The answer also set out the Kansas statute in full, and alleged that defendant had agents in the state of Kansas to receive service as required by the law of that state, and pleaded these facts as a bar to the action. Yet the court held that, even if it were conceded that the statute of Kansas operated to extinguish the right and not simply to affect the remedy, the defendant's answer was defective, because it did not contain the averment that plaintiff and defendant were both residents of the state of Kansas during all the time limited after the cause of action accrued.

§ 186. In *Hood v. Nicholson*,[3] which is one of the latest cases in which this question is discussed, it is said that in considering pleadings the court should lean toward rather than against the pleader, in obedience to the modern rule of giving to him the benefit of every reasonable intendment and presumption where the pleading is assailed on demurrer. And there is an earlier case, in which the action was upon an instrument whereby defendants obligated themselves to pay to bearer twenty thousand feet

doctrine will be found in Olcott v. Carroll, 39 N. Y. 436; Clay v. Edgerton, 19 Ohio St. 549; McGlasson v. Bradford, 7 Bush (Ky.), 250; Shank v. Teeple, 33 Iowa, 189. The Wisconsin court has gone even further, holding that the presumption is in favor of the pleader. Morse v. Gilman, 16 Wis. 504; Gunn v. Madigan, 28 Wis. 158. See also the Missouri cases cited in § 186.

[1] Lyman v. Campbell, 34 App. 213.

[2] 123 Mo. 573.

[3] 137 Mo. 400.

of salable lumber. There was an averment that plaintiff had often demanded the lumber of defendants, and that it failed and refused to pay it. In deciding the demurrer the court, speaking through Sherwood, J., says: "We must assume on the face of the pleadings that the demand made for the delivery of the lumber was such a demand as the law will sanction."[1] A decision of the court of appeals is an illustration of the opposite tendency. It is a case where plaintiff brought an action based upon his exclusion from the public schools. He stated in his petition that his age was over six years and under twenty-one years. As the constitution[2] provides that the school age is between six and twenty years, it was held that the petition failed to state a cause of action; for *non constat* that he was over twenty years and yet under twenty-one years of age.[3]

**§ 187. Presumptions in regard to pleading.**— If a petition declares upon a contract without stating whether it is in writing or not it will be presumed that it is in writing.[4] The rule that a condition of things once shown to exist will be presumed to continue until the contrary appears, though generally stated as a rule of evidence, yet applies also to pleading.[5] Where in an action upon an insurance policy the answer sets up as a defense that the company elected to repair, and so notified the plaintiff, the clear implication is that plaintiff had performed the conditions precedent as to furnishing proofs of loss.[6]

**§ 188. Admissions by pleading.**— Every material allegation of the petition which is not controverted by the answer, and every material allegation of new matter in the answer which is not controverted by the reply, is for the purpose of the action to be taken as true; but the allegation of new matter in the reply is deemed controverted by the adverse party as upon a direct denial or avoidance.[7] The date of an account sued on is not a material fact which must be set forth in the petition.[8] But the date of a note must be stated.[9] Where the answer consists of a general denial except that which may be hereinafter expressly admitted, and in a subsequent clause defendant "admits the indebtedness," this is an admission of the debt and its date as

[1] Spears v. Bond, 79 Mo. 467.
[2] Art. XI, § 1.
[3] Rogers v. McCraw, 61 App. 407.
[4] Sharkey v. McDermott, 91 Mo. 467; Van Idour v. Nelson, 60 App. 523.
[5] Stone v. Wendover, 2 App. 247.
[6] Rieger v. Mechanics' Ins. Co., 69 App. 674. See also § 186, n. 1, p. 117.
[7] Rev. Stat. 1899, sec. 628.
[8] Sutter v. Streit, 21 App. 157.
[9] Grant v. Winn, 7 Mo. 188.

charged in the petition.[1] The party is not bound to produce any evidence on the point which is not controverted.[2]

§ 189. **Admitting allegation of value.**— In an action against a carrier for failure to deliver certain malt shipped by plaintiff, the petition stated the value of the malt, which allegation was not denied in the answer. The trial court told the jury that the value of the malt was admitted. But the supreme court held that this was erroneous, as the value of the article shipped was an immaterial averment.[3] And the same rule was announced in a later case, which was an action for a conversion, the court saying, while citing with approval the preceding case, "these allegations of value are not what are termed traversable, so as to conclude the opposite party if not answered."[4]

§ 190. **Illustrations of the rule as to admissions by pleading.**— Where the petition charges that defendant owes plaintiff for goods sold and delivered, an answer which merely denies the indebtedness impliedly admits the sale and delivery.[5] In an action on one of several policies of insurance on a steamboat, the averment that the boat was worth more than all the insurance thereon is a material allegation, which stands admitted if it is not denied.[6] If in an action on a policy of insurance the petition does not allege that plaintiff had an insurable interest in the property, the fact that the answer does not aver that plaintiff had no insurable interest does not constitute an admission of that fact.[7]

§ 191. If in a suit for an accounting defendant pleads a full and complete settlement, he will not be permitted to introduce evidence going behind such alleged settlement to establish a fact embraced in it.[8] In an action to rescind a contract on the ground of fraud, if the answer does not distinctly deny the charge of fraud and notice thereof, such charge will be taken as confessed.[9]

§ 192. In an action on a contract the answer contained, *first*, a denial under oath of the execution of the writing, and, *secondly*, alleged that the contract was not performed as therein provided.

[1] Snyder v. Free, 114 Mo. 360.

[2] Moore v. Sanborin, 42 Mo. 490; State ex rel. v. Maloney, 113 Mo. 367.

[3] Wood v. Steamboat Fleetwood, 19 Mo. 529.

[4] Field v. Barr, 27 Mo. 416.

[5] Lee v. Casey, 39 Mo. 383. See also § 188, n. 1, p. 118.

[6] Marshall v. Thames Fire Ins. Co., 43 Mo. 586.

[7] Clevinger v. Northwestern Ins. Co., 71 App. 73.

[8] Inglis v. Floyd, 33 App. 565.

[9] Boles v. Bennington, 136 Mo. 522.

These defenses are not so inconsistent that they cannot stand together, and hence the answer taken as a whole does not constitute an admission of the execution of the instrument.[1]

§ 193. If a town commences proceedings to condemn land belonging to a party it thereby admits the title to be in such party, and will not be allowed, when the question of damages is in issue, to prove that it belonged to some one else.[2]

§ 194. If in a replevin suit the answer admits that the replevied goods had been purchased from plaintiff by the assignor of defendant, defendant will not be allowed to establish the contrary by his evidence.[3]

**§ 195. Admission by confession and avoidance.**— Where a defendant denies and at the same time confesses and avoids, that part of the answer which constitutes the confession will be taken as true, if defendant fails to prove the matter in avoidance.[4]

**§ 196. Admission where there are successive answers.**— Where successive answers are filed, all facts stated in the petition which are not denied in the last answer stand admitted.[5]

**§ 197. Admission by one of several defendants.**— Where there are several defendants, the fact that the new matter in the answer of one of them is not put in issue by a reply will not render such answer admissible in evidence in favor of another defendant, the allegations of whose answer have been denied by the reply. The facts controverted are to be taken as true in favor of the party pleading them, but not as a matter to be submitted to and found by the jury.[6]

**§ 198. Where the averment of the petition is uncertain.**— A failure to deny an allegation lacking certainty is not an admission of such allegation.[7] And where the answer contains an averment that the plaintiff knew certain facts, this does not tender an issue as to the existence of such facts; if, in his reply, plaintiff denies that he knew of the existence of the facts, this is not by implication an admission that the facts actually existed.[8] In a case arising on the criminal side of the court, the question is discussed as to the effect of a failure to deny vague and uncertain allegations in a pleading. Defendant filed a plea in bar

[1] Cox v. Bishop, 55 Mo. 135. As to inconsistencies in pleading, see §§ 73, 233, 284, 527–530, 549.

[2] Wright v. Butler, 64 Mo. 165.

[3] Burnham v. Ellmore, 66 App. 617.

[4] McCord v. Doniphan Branch R. Co., 21 App. 92.

[5] Rand v. Grubbs, 26 App. 591.

[6] Bartholow v. Campbell, 56 Mo. 117.

[7] State v. Williams, 12 App. 415.

[8] Thomas v. Liebke, 13 App. 389.

to the indictment against him, in which he attempted to set up that the statute under which he was prosecuted was not enacted in the manner and form required by the constitution and law of Missouri. The state failed to traverse the plea, and, as it was sworn to, defendant's counsel insisted that the facts stated in it must be conclusively taken as true. But the court of appeals held that, as all of the allegations but one were of a general character, and such as might by reason of their want of certainty have been stricken out, it was not necessary for the state to traverse them. The one exception reads as follows: "and from the official journals of the senate it appears that the bill for such alleged statute was read only twice in such senate prior to the signing thereof by its officers." But the court held that even this was not a sufficiently full statement to put the state to the burden of traversing it.[1]

§ **199. Binding representative by admission.**—The legal representative who is substituted for a deceased party may adopt the pleadings of the party whom he represents, but is not bound to do so; and if he declines to adopt them, he is not bound by any admissions contained in them. And there is nothing in section 760[2] which makes such pleadings binding upon the representative.[3]

§ **200. Direct admissions.**—Where the answer not only fails to deny certain facts alleged, but expressly admits them, they become indisputable on the trial, and evidence to disprove them will not be admitted.[4] And if defendant in one part of his answer admits the execution of the instrument sued on, such admission runs through the whole defense and all parts of the answer, including a counter-claim.[5] In an action on a contract for doing certain work the plaintiff alleged that for the work done the said defendants agreed to pay $1,030. The answer contained the following clause: "For and in consideration of which these defendants promised to pay plaintiff the sum of $1,030." In a subsequent count of the answer, in the nature of a counter-claim against plaintiff for damages for defective work, defendants set up the terms of the written contract, wherein it was

[1] State v. Williams, 12 App. 415. The judgment in this case was affirmed by the supreme court (77 Mo. 310), but no notice is taken in that court of the above point.

[2] Rev. Stat. 1899.

[3] Scott v. Davis, 141 Mo. 213.

[4] Wright v. Butler, 64 Mo. 165; Campbell v. St. Louis, I. M. & S. R. Co., 16 App. 553.

[5] Cox v. Volkert, 86 Mo. 505.

stipulated that the work was to be paid for in notes; but no such allegation was made in the answer proper. It was held that the answer directly admitted that the consideration for the work was to be paid in money, the whole tenor and effect of the answer being to declare wherein plaintiff had failed to do the work in the manner provided in the contract.[1]

§ 201. The parties will be held strictly bound by the allegations in their pleadings. Thus, where, in an action for killing stock by a railroad company, plaintiff alleges that the stock came upon the railroad and was killed at a point where the railroad passed through inclosed lands, he will be bound by this allegation, there being nothing in the evidence to controvert such statement.[2] And if defendant in his answer admits that he is in actual possession of the premises for which ejectment is brought, and claims to hold the same for value and without notice, he will be bound by such admission and will not be allowed to claim differently on the trial of the question of rents and profits.[3] In an action of ejectment against a county to recover land taken for a public road, the answer set up the proceedings to open the road, averred their validity, and alleged that the road had been used as a public highway continuously since the time of such opening until the date of the answer. These allegations constitute an admission of possession by the county, and no proof of such possession need be offered.[4] If the petition alleges a leasing for a term of years, and the answer admits the agreement as alleged in the petition and the taking possession of the premises, it is immaterial whether the instrument was sealed or unsealed.[5] On the other hand, if an action for rent is founded on a written instrument which is on its face a mere contract for operating a railroad and not a lease, an admission in the answer that it is a lease is not conclusive on defendant, where such admission is accompanied by a profert of the instrument itself.[6]

§ 202. Where all the indorsements on a note have not been set out in the petition, an admission of the material allegations is not an admission that there have been no holders except those

[1] Globe Light & Heat Co. v. Doud, 47 App. 439.

[2] Geiser v. St. Louis, I. M. & S. R. Co., 61 App. 459.

[3] Pike v. Martindale, 91 Mo. 268. As to inconsistent allegations in pleadings see §§ 73, 233, 284 and 527.

[4] McCarty v. Clark County, 101 Mo. 179.

[5] De Loge v. Hall, 31 Mo. 473.

[6] St. Jos. & St. Louis R. Co. v. St. Louis, I. M. & S. R. Co., 135 Mo. 173.

set out.[1] When an admission is made in an answer it includes the dates of the facts as alleged in the petition.[2]

§ 203. In an action to recover the value of a furnace placed in defendant's house, the petition alleged that plaintiff "did connect the said furnace together with a smoke-pipe and cold-air pipes all complete, and did furnish all the materials therefor, in accordance with said contract, and in accordance with the directions of the said defendant." The answer contained the admission that "plaintiff placed in the house in question a number 70 furnace, and built the same in brick, and made the hot-air connections with hot-air pipes then in said house, and furnished one extra register with border and smoke-pipe and cold-air pipe." It was held that the answer contained no admission that the pipes were of the quality described in the contract.[3]

**§ 204. How a direct admission is affected by a general denial.**— If the answer is to be construed as containing an admission of a fact alleged in the petition, defendant cannot get rid of such admission by resorting to the practice of winding up his answer with the vague statement that defendant denies all allegations except as before admitted.[4]

**§ 205. Indirect admissions.**— If the answer contains a general denial there can be no implied admission of any facts stated in the petition.[5] But an argumentative denial is indirectly an admission, since it raises against the pleader the inference that he was unable to deny as the practice act requires. Such denial is forbidden by two rules of pleading: *first*, that facts must be alleged by direct averment; *second*, that they must be alleged with definiteness, so that nothing is left to inference.[6] Where in an action on a promissory note the defendant alleges that he did not execute the note sued on, but that he executed one like that described in the petition but with certain additions thereto, the execution of the note is admitted.[7] In an action by an assignee of an instrument, where the plea is *non est factum*, the fact of the assignment is admitted.[8] Where the pleadings admit that goods were levied on by an officer under an execution in favor of defendant, and were released and tendered to plaintiff

[1] Kinealy v. Burd, 9 App. 359.
[2] Sumner v. Rogers, 90 Mo. 324.
[3] Halpin v. Manny, 33 App. 388.
[4] Bredell v. Alexander, 8 App. 110. See next succeeding section.
[5] State to use v. Samuels, 28 App. 649.
[6] Bredell v. Alexander, 8 App. 110.
[7] Kinman v. Cannefax, 34 Mo. 147.
[8] Ragland v. Ragland, 5 Mo. 54; Davis v. Imboden, 10 Mo. 340.

and by him refused, this is an implied admission that the goods were taken out of plaintiff's possession, and he is only required to show their value. And it is immaterial in such a case whether plaintiff's possession was that of a pledgee or mortgagee.[1] And if, in an action of trespass *de bonis asportatis*, defendant alleges in his answer that "after the execution of the said mortgage, etc.," this must be regarded as an explicit admission of the execution of a mortgage which was charged in the petition to have been executed by the owner of the land to plaintiff.[1]

**§ 206. Negative pregnant.**—Many of the cases illustrating the above rule, though not all of them, come within the doctrine of negative pregnant. That doctrine, however, is not applied in its strictness in Missouri, since, if it were, a pleading open to that objection would be held worthless, as it was under the common law. Its application in this state goes only so far as to make those allegations which are not distinctly denied — which are in fact embraced in the pregnant negative — stand admitted. This clearly appears from the decisions cited in this section and the one following.[2] In an action upon an insurance policy it was charged in the petition that the building was burned on November 28th, and the answer denied the destruction of the property "as alleged." The effect of this answer is to admit the destruction of the house by fire, since it is tantamount to saying that the house was destroyed by fire, but not on the day nor in the way you say it was. The answer further stated that "defendant avers that before said building was burned as alleged," and further "that at and immediately before the time when said building was burned mechanics were at work." These averments constitute an admission of the destruction of the building as charged in the petition.[3] In the same case the petition charged that the policy was assigned on October 15th by the assured to the plaintiff, and that said assignment was approved in writing by the regular agent of the defendant at Springfield, Mo. The answer contained the following sentence: "Defendant denies that it ever consented to said pretended assignment of said policy, and that the act of its agents at Springfield in consenting thereto was made without any authority conferred on them by this defendant." This is clearly an admission by defendant that the agents named were its regular agents, that they did consent in writing, and that their signatures

[1] Howell v. Caryl, 50 App. 440.

[2] This subject is also discussed, and additional decisions are cited, in the chapter on The Denial. See §§ 543–545, *post*.

[3] Breckinridge v. American Central Ins. Co., 87 Mo. 62.

evidencing such consent were genuine. The only fact put in issue is the authority of those agents in the particular instance.[1] If the answer to an action upon a policy of insurance sets up as a defense that defendant elected to repair, and so notified the plaintiff, the clear implication from this averment is that plaintiff performed the conditions precedent as to furnishing proofs of loss.[2]

§ 207. **Illustrations of negative pregnant.**— In a suit for foreclosure of a mortgage which the petition alleged to have been assigned to plaintiff, the answer contained the following sentence: "Defendants deny that said mortgage was ever assigned to plaintiff further than would accrue in equity from an assignment of said notes, if they were ever assigned." There was also an averment that defendants had no knowledge or information sufficient to form a belief as to whether the assignment or indorsement was made on the notes by one having authority. Under these denials it was held that the assignment was admitted.[3] In an action on a note, where the petition alleged that the payee sold and transferred by delivery said note to plaintiff for a valuable consideration to the said payee in hand paid by plaintiff, and the answer denies that said payee sold and transferred by delivery said note for a valuable consideration to the said payee in hand paid by the plaintiff as stated in the petition, the answer does not deny title to the note, but only the manner of acquiring it.[4] Where the petition charged a trespass *de bonis asportatis*, and the answer denied plaintiff's ownership of the property, and also denied that defendant wrongfully entered upon the premises and took the property, the entering and taking are admitted.[5] If the petition alleges that notice had been given as required by law, and the answer takes issue on the sufficiency of the notice generally, as by denying that it was served as required by law, the lawfulness or sufficiency of the notice is alone put in issue, and the fact that a notice was given, and that it was given at the time alleged, is admitted.[6] An answer in ejectment which denies the unlawful entry of defendants, and that they unlawfully withhold possession, admits the possession.[7] So, where the petition contains an allegation to the

[1] Breckinridge v. American Central Ins. Co., 87 Mo. 62.

[2] Rieger v. Mechanics' Ins. Co., 69 App. 674.

[3] Byington v. Hogan, 58 Mo. 509. See also § 206, n. 3, p. 123.

[4] Wilson v. Murphy, 45 Mo. 409.

[5] Emory v. Phillips, 22 Mo. 499.

[6] Soeding v. Bartlett, 35 Mo. 90; Gorman v. Dierkes, 37 Mo. 576.

[7] Tomlinson v. Lynch, 32 Mo. 160.

effect that plaintiff is entitled to the possession of land or of some specified part of it, and that defendant withholds the possession of the whole or such specified part from plaintiff, and the answer admits that defendant withholds possession from plaintiff, but denies that he does so unlawfully, the only reasonable and fair interpretation of such an averment is that the defendant holds possession of the lot, or of the particular part thereof specified in the petition.[1]

§ 208. **Illustrations of admissions by pleading.**— Where the action is for breach of a contract of employment, and the answer admits the employment, but avers that it was for a different compensation from that alleged in the petition, no question can be raised as to the authority of the agent who in behalf of defendant made the contract with the plaintiff.[2] In an action to recover damages received by plaintiff in a coal mine, the petition, in order to meet the defense of contributory negligence, contained an allegation that plaintiff was rendered unconscious as the result of defendant's negligence, but he introduced no evidence to support this allegation of the petition, and it was held that his contributory negligence was thereby admitted.[3] Where the answer alleges that, since the making of the note sued on, certain payments had been made on it, the execution of the note is admitted.[4]

§ 209. If, in an action on a policy issued by a mutual fire insurance company, the answer contains no direct admission of the issuance of the policy as charged in the petition, but its issuance and acceptance as a live policy are not denied, and it is specifically admitted that plaintiff was a member of the company and held a certificate of membership, this is tantamount to an admission that the policy was issued to him.[5] If, in an action on an insurance policy, the petition does not allege that plaintiff had an insurable interest in the property, the mere omission of the answer to deny that fact does not amount to an admission of it.[6]

§ 210. In an action against a railroad company for wrongfully appropriating plaintiff's land, the petition alleged that defendant appropriated a strip of land one hundred feet wide. The answer averred that defendant was in the lawful possession of the prem-

[1] Jordan v. Surghlor, 107 Mo. 520.

[2] Cross v. Atchison, T. & S. F. R. Co., 71 App. 585.

[3] Lenk v. Kansas & Texas Coal Co., 80 App. 374.

[4] Wisdom v. Shanklin, 74 App. 428.

[5] Spencer v. Farmers' Ins. Co., 79 App. 213.

[6] Clevinger v. Northwestern Nat. Ins. Co., 71 App. 73.

ises described in the petition. It was held that these averments taken together are susceptible of no other meaning than that defendant took possession of a strip of land one hundred feet in width where its railroad is located over plaintiff's lots, and that it was in possession of such land at the time the action was commenced, and therefore evidence to establish the width of the strip was unnecessary.[1]

§ 211. The petition in a partition suit alleged that plaintiffs were the owners of the land subject to the widow's unassigned dower, and that her dower interest had been conveyed to H., one of the defendants. H. in his answer averred that the widow had both a dower and homestead interest, and that he had acquired both; also that the administrator had sold the land and H. had become the purchaser, which sale had been approved by the court. The reply was a general denial of the answer "so far as the same controverts the allegations stated in the petition." By this reply the alleged sale by the administrator, the purchase of the land by H. and the approval thereof were not admitted. All the averments of the answer, except that as to dower, controverted the averments of the petition and were put in issue by the reply.[2] Where an action was brought on an agreement by the defendant to pay taxes on certain premises leased to him, and he pleaded in defense, *first*, a release, and *second*, that he had in fact paid the taxes, both grounds of defense admit the assessment and legality of the taxes.[3]

**§ 212. The above rules apply only to pleadings.**— The rules as to admissions apply only to pleadings strictly so called. A written motion for an order on the sheriff to pay over to plaintiff funds in the hands of the sheriff is not a pleading, but is in the nature of a suggestion to the court, and the averments contained therein are not admitted because the sheriff does not deny them in his return to the order.[4]

**§ 213. Judgment on the pleadings.**— If the answer sets up a completed accord and satisfaction, a judgment on the pleadings is improper, because such accord and satisfaction is binding upon both parties, and bars them both.[5] This subject, however, belongs more properly in a work on Practice.

[1] Ragan v. Kansas City & S. E. R. Co., 144 Mo. 623.

[2] Colvin v. Hauenstein, 110 Mo. 575.

[3] Blumenthal v. Mugge, 43 Mo. 427. The case of Sprague v. Sea, 152 Mo. 327, is one in which the allegations of the answer are held to contain an admission of a certain essential fact, and to warrant an instruction based upon such admission.

[4] Adler v. Lang, 26 App. 226.

[5] Dalrymple v. Craig, 70 App. 149.

## CHAPTER X.

### JOINING CAUSES OF ACTION.


§ 214. When there is but one cause of action.
215. But one cause of action — Further illustrations.
217. Further illustrations — Actions on contract.
219. Further illustrations — Actions on bonds.
220. Further illustrations — Actions for slander.
221. Several causes of action.
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**§ 214. When there is but one cause of action.**— The various forms or subjects of injury sustained from a single wrongful act do not multiply the causes of action. Thus, in an action against a municipality for damages caused to property by a change in the grade of a street, where the plaintiff owns the fee of one lot and a leasehold of the adjoining lot, he may sue in one count for the damage to both.[1] In an action by a discharged employee, the petition is not bad as joining two causes of action in one count, because it seeks to recover for services rendered under the contract of employment, and also damages for the wrongful discharge.[2] If the action is based upon a failure of the employer to provide the proper appliances for his employee, and the petition specifies a number of defects in the machinery, which were not inconsistent with each other, nor repetitions of the same defect, but set forth separate and cumulative specifications of different defects, there is no misjoinder.[3] But in an action

[1] Stickford v. St. Louis, 7 App. 217; affirmed, 75 Mo. 309.

[2] Estes v. Desnoyers Shoe Co., 155 Mo. 577. See Ehrlich v. Ætna Life Ins. Co., 88 Mo. 249, and also §§ 217 and 218, *post*.

[3] Bartley v. Trorlicht, 49 App. 214.

by an employee to recover against his employer for personal injuries, if the plaintiff seeks to recover for the negligence of the company itself, or its vice-principal, and at the same time seeks to charge the company for the negligence of a fellow-servant, as contradistinguished from a vice-principal, he must set out each of those causes of action in a separate count; he cannot blend the two in one count and try the cause on both together.[1]

§ 215. **But one cause of action — Further illustrations.**— Where an action is brought for damages for the maintenance of a private nuisance, and the petition contains a prayer for an injunction to prevent its continuance, this is but a single cause of action for which double relief is asked; and it is erroneous to ignore the allegation of damages, and to treat the cause simply as one for an injunction.[2] Damages by repeated acts of trespass by cattle, owing to the failure of a railroad company to erect and maintain a fence, may be sued for in one count.[3] And a petition which sets forth a trespass on plaintiff's premises, with a further allegation of the destruction of grass thereon, is nothing more than the setting out of an element of damage flowing from the trespass, and states but one cause of action.[4] But where a petition alleges that defendant, by its diversion of a water-course, destroyed plaintiff's crops during several years, and asks a gross sum for the damages, the petition is bad, since it unites several causes of action in one count.[5] Statements of injuries to the person and of injuries to his property, resulting from the same wrongful act, are not statements of different causes of action.[6] A petition in trover which alleges that a steer was delivered to a carrier for transportation, that the carrier negligently suffered him to escape, and afterwards found him and converted him to his own use, states but one cause of action.[7] And the statement of a conversion, with the additional averment that it was done under such circumstances as afforded grounds for exemplary damages, is not a statement of two causes of action.[8]

§ 216. The statute as to mortgages provides for an entry of satisfaction and release of the property when the secured debt is

[1] McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285.

[2] Whipple v. McIntyre, 69 App. 397.

[3] Ray v. St. Louis, I. M. & S. R. Co., 25 App. 104.

[4] Cook v. Redman, 45 App. 397.

[5] Offield v. Wabash, St. L. & Pac. R. Co., 22 App. 607.

[6] Bodeman v. Crawford, 2 App. 598; Lamb v. St. Louis, C. & W. R. Co., 33 App. 489.

[7] Johnson v. Wabash, St. L. & Pac. R. Co., 22 App. 597.

[8] Peckham v. Lindell Glass Co., 9 App. 459.

fully paid, and further provides that if the person receiving satisfaction does not, within thirty days after request and tender of the costs, properly acknowledge satisfaction, he shall forfeit to the party aggrieved ten per cent. of the amount of the mortgage absolutely, and any other damages such party may prove he has sustained.[1] In an action by the mortgagor for a failure to make the release provided for in this section, the claim for the penalty and that for damages should be set out in separate counts.[2]

§ 217. **Further illustrations — Actions on contract.**— When a contract contains several stipulations, a petition alleging breaches of the different stipulations is not open to the objection of having joined two causes of action in one count.[3] Several breaches of the same contract make only one cause of action, and they should all be stated in the same count.[4] Where there is an agreement to pay a given sum of money, and in case of failure to pay the same on maturity, so that it becomes necessary to sue for the amount, to pay a reasonable attorney's fee in addition, there is but one contract with two stipulations, and a demurrer will not lie because the petition contains but one count. Had plaintiff brought his action on one stipulation, omitting the other, he might have barred himself from a subsequent action on the remaining stipulation.[5] When the petition states that the plaintiff sold to defendant a lot of goods at a fixed price, that a part were delivered, and the balance were not delivered because defendant refused to receive them, it states but one cause of action.[6]

§ 218. Where there are separate and distinct contracts, and there is a clause of guaranty in each which is a distinct contract of guaranty, an action upon the different guaranties in which the petition contains but one count cannot be maintained.[7] Where an action on an indenture of apprenticeship sets out various breaches, and their investigation involves separate and independent inquiries, they are independent causes of action, though arising out of the same contract.[8]

§ 219. **Further illustrations — Actions on bonds.**— In an action upon an official bond the various breaches assigned do not

[1] Rev. Stat. 1899, sec. 4363.

[2] Scott v. Robards, 67 Mo. 289.

The cases which will be found in sections 230–232, *post*, have also more or less bearing on this point.

[3] Rissler v. American Central Ins. Co., 150 Mo. 366.

[4] Pryor v. Kansas City, 153 Mo. 135.

[5] Comstock v. Davis, 51 Mo. 569.

[6] Hollfield v. Black, 20 App. 328.

[7] Watkins v. Pierce, 10 App. 595.

[8] Boyce v. Christy, 47 Mo. 70.

constitute several causes of action.[1] And if the first cause of action alleged is that a right has accrued for the penalty of the bond, and the second count assigns the damages specifically, but there is only one prayer for judgment, the petition contains in fact but one cause of action.[2] Where the breach assigned is that the county auditor converted to his own use the county school fund, and there is a further averment that he did not secure to each township its share of the school fund, there is but one breach assigned and no misjoinder.[3] Even though the plaintiff in an action on a bond sets out the breaches in the form of several counts, the petition nevertheless states but a single cause of action on the bond.[4]

§ 220. **Further illustrations — Actions for slander.** — Distinct defamatory statements imputing the same offense to the plaintiff, but couched in different phraseology, and not appearing to have been spoken in the presence of the same hearers, need not be embraced in one count,[5] though it is permissible to do so.[6] And it seems that even when spoken on one occasion and in the presence of the same hearers a like rule would obtain.[5] It is only when the different words or utterances of the defendant are such as would, when grouped together, constitute but one offense that the same slander may be stated several times in the same count; if the different utterances charge different offenses, they must be set out in separate counts. And while causes of action for words imputing to plaintiff the crimes of perjury, larceny and adultery may be united in the same petition, they must be separately stated, with the damages sought for each.[7] It has been held by the supreme court in a later case that different sets of words spoken on different occasions may be set forth in one count, and be included in the same cause of action with one conclusion and one prayer for damages.[8] Where defendant was charged with saying of plaintiff, "she is a common whore," and also with saying "she has been in the penitentiary here," the slanders are separate and distinct, and should not be embraced in one count.[9]

[1] State to use v. Davis, 35 Mo. 406.
[2] State to use v. Webster, 53 Mo. 135.
[3] State to use v. Bonner, 5 App. 13.
[4] Hickory County v. Fugate, 143 Mo. 71.
[5] Walter v. Hoeffner, 51 App. 46.
[6] Casey v. Aubuchon, 25 App. 91.
[7] Christal v. Craig, 80 Mo. 367. See Casey v. Aubuchon, 25 App. 91.
[8] Lewis v. McDaniel, 82 Mo. 577. And this last decision is in line with Birch v. Benton, 26 Mo. 153, and Pennington v. Meeks, 46 Mo. 217.
[9] Michael v. Matheis, 77 App. 556.

**§ 221. Several causes of action.**— A plaintiff may unite in the same petition several causes of action, whether they are legal or equitable, or both, where they all arise out of, *first*, the same transaction, or transactions connected with the same subject of action; *second*, a contract, express or implied; *third*, injuries with or without force to person and property, or either; *fourth*, injuries to character; *fifth*, claims to recover real property, with or without damages for withholding it, and the rents and profits; *sixth*, claims to recover personal property, with or without damages for the withholding of it; or, *seventh*, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of the above classes, and must affect all the parties to the action, and must not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished.[1] Several causes of action for injuries to person or property, whether direct or consequential, and whether damages are given by statute or by common law, and whether they are single or double, may under the above section be included in the same petition.[2] *Mandamus* cannot be joined with other actions.[3]

**§ 222. Section 593 construed.**— That several causes of action may arise out of the same transaction is thus recognized in express terms by the statute.[4] But that causes of action may be properly joined, the several causes of action must be in favor of all the plaintiffs and against all the defendants.[5] So it is held that a cause of action founded on a contract cannot be united with one based on injury to property.[6] At the term of the court preceding that in which the above decision was rendered, it was held that two such causes of action could not be joined, even though they both grew out of the same transaction.[7] This proposition was, however, modified in a case decided during the next year, it being then held that a petition was bad which contained two counts, one sounding in damages and the other founded upon matters of contract, the two causes of action not arising

[1] Rev. Stat. 1899, sec. 593; Callahan v. McMahan, 33 Mo. 111; McHoney v. German Ins. Co., 44 App. 426; Morrison v. Herrington, 120 Mo. 665.

[2] Clark v. Hannibal & St. J. R. Co., 36 Mo. 202.

[3] Barada v. Carondelet, 16 Mo. 323.

[4] Brown v. Chadwick, 32 App. 615.

[5] Stalcup v. Garner, 26 Mo. 72, 74, following the New York decisions.

[6] Ederlin v. Judge, 36 Mo. 350.

[7] Jamison v. Copher, 35 Mo. 483.

out of the same transaction.[1] I think the tendency now is to a more liberal interpretation of the statute than that put upon it in the case of *Jamison v. Copher*.[2] And in *Spangler v. Kite*[3] the St. Louis court of appeals holds that it is proper to unite in the same petition, in different counts, a cause of action on a warranty in the sale of a mare and a cause of action for deceit practiced in the same sale. In a case where the petition contained two counts, the first of which was held to be founded upon contract and the second founded upon tort, the court says that "the plaintiff's right to go to the jury upon his contract-demand is not to be denied on account of its alleged misjoinder with the *ex delicto* claim in the second count; nor is his right prejudiced by the circumstance that both court and counsel treated the case throughout the trial as an action for deceit."[4] The court also says in that case: "That a party improperly unites several causes of action can work no detriment further than the elimination of some of them; and not even that, if the adverse party fails to complain at the proper time. This is equivalent to saying that if the adversary does not properly object there is no misjoinder at all."[5]

§ 223. **Cases decided under the above section.**— A count on a promissory note may be joined in the same petition with a count for goods sold and delivered.[6] Plaintiff sold an animal to one S., to whom, while the purchase-money was still unpaid, he shipped him by the defendant express company. The animal having been killed while in the custody of defendant, plaintiff brought an action for his value. He framed his petition in two counts, in one of which he alleged himself to be the owner, and in the other he claimed as assignee of the right of action of S. It was held that a demurrer to the evidence would not lie on the ground of a misjoinder of causes of action.[7]

§ 224. Plaintiff may unite in the same petition two counts for the same injury by a railroad company, one under section 1105[8] for double damages, and the other under section 2867[8] for single damages, and he is entitled to go to the jury on both, and will not be compelled to elect on which cause of action he will stand.[9]

[1] Hoagland v. Hannibal & St. J. R. Co., 39 Mo. 451. As to what is a "transaction," see § 664, *post*.

[2] Jamison v. Copher, 35 Mo. 483.

[3] 47 App. 230.

[4] Sumner v. Tuck, 10 App. 269, 279.

[5] Sumner v. Tuck, 10 App. 269, 277. Consult in this connection ch. XXXVI.

[6] Howard v. Shirley, 75 App. 150.

[7] Harris v. Pacific Exp. Co., 67 App. 175.

[8] Rev. Stat. 1899.

[9] Straub v. Eddy, 47 App. 189.

§ 225. Where a debtor has made an assignment for the benefit of creditors, and has failed to include in it a certain piece of land, which he afterwards conveys to a third party, a suit to set aside the conveyance of such land on the ground of fraud cannot be joined with a count for an accounting under the assignment.[1]

§ 226. A woman cannot, in an action for breach of promise of marriage, join a count for seduction.[2] She may maintain an action for seduction accomplished under promise of marriage, but in such case the petition should contain only one count.[3]

§ 227. **The rule in justices' courts.**— Confusion is liable to arise unless there is kept carefully in mind the distinction between cases originating before justices of the peace and those brought in a court of record. The only restriction to joining several causes of action in proceedings before justices is that causes of action founded in contract cannot be joined with those founded in tort.[4] In cases originating in courts of record the rule is different. Section 593[5] expressly provides that causes of action shall not be united in the same petition unless they belong to one and the same class of the several classes enumerated in that section.[6]

§ 228. **Party suing or being sued in more than one capacity.** A cause of action by or against a person in his individual capacity cannot be joined with a cause of action by or against the same person in a representative capacity.[7] Thus an action for waste

[1] Hatcher v. Winters, 71 Mo. 30.

[2] Roper v. Clay, 18 Mo. 383.

[3] Comer v. Taylor, 82 Mo. 341.

[4] See Rev. Stat. 1899, sec. 3851.

[5] Rev. Stat. 1899.

[6] Roberts v. Quincy, O. & K. C. R. Co., 43 Mo. 287.

[7] Mertens v. Loewenberg, 69 Mo. 208. The reason for thus holding is stated to be that if a plaintiff sues as an individual the recovery belongs to him personally, while if he sues in a representative capacity the money belongs to the estate or to the beneficiary whom he represents. On the other hand, if he is sued as an individual the judgment goes against his own property, whereas if he is sued as a representative the judgment is to be satisfied out of the goods or funds which he holds as representative or as trustee. I confess that I am unable to see the force of this reasoning. Under the common-law practice the objection would of course be a fatal one, since the common law knows no judgment in a legal action except a single and absolute one. But it is not apparent that there is presented any greater difficulty in determining in a single judgment what portion of the judgment shall be satisfied out of the property of the individual, and what portion of it shall be satisfied out of the estate which that same individual represents, and in ordering its satisfaction accordingly, than is presented in many of the judgments which our code permits to be rendered. It must be admitted, however, that

against one who is in possession of land as an executor under the will of the former owner is improperly joined with an action for partition of the property, to which defendant is made a party in his personal capacity.[1] In *State to use v. Schneider*,[2] it was held that a count against A. as principal and B. as surety in a bond may be joined with a count against B. as principal and A. as surety in another bond. But it was also held that, even if there were a misjoinder, it was cured by verdict, and the decision cannot, therefore, be said to be of controlling authority.

§ 229. **Joining legal and equitable causes.**— The Code permits the joining of legal and equitable causes of action.[3] But where a petition mingles in one count allegations common to actions at law with those peculiar to equitable proceedings for the reformation of a policy, the plaintiff may be compelled to elect; and if he elects to proceed at law, he abandons his cause in equity, and is not entitled to introduce any evidence which is pertinent alone to that issue.[4]

§ 230. **The different causes of action must be separately stated.**—Where different causes of action are united in the same petition, they must all belong to one of the classes mentioned, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished.[5] If two causes of action belong to the same one of those classes mentioned in section 593, they may be joined in one suit, but they should be stated in separate counts.[6] Where sev-

some countenance is afforded to the above ruling by the language of the seventh subdivision of section 593, taken in connection with the last sentence of that section. The seventh subdivision names as one of the classes of actions "claims by or against a party in some representative or fiduciary capacity;" and this is followed by the provision that the causes of action so united must all belong to one of these classes. It may be urged with considerable force that an action by or against a person in his individual capacity cannot be included in the seventh class. I cannot escape the conviction that in this regard an amendment to the section might well be made, which shall in express terms permit an action by or against a person as an individual to be joined with an action by or against the same individual in a representative or fiduciary capacity. See Rubey v. Barnett, 12 Mo. 3.

[1] Lilly v. Menke, 126 Mo. 190.

[2] 35 Mo. 533.

[3] Rev. Stat. 1899, sec. 593; Bobb v. Woodward, 42 Mo. 482; Henderson v. Dickey, 50 Mo. 161.

[4] Kabrich v. State Ins. Co., 48 App. 393. See also the cases cited § 231.

[5] Rev. Stat. 1899, sec. 593; Childs v. Bank of Missouri, 17 Mo. 213; Mooney v. Kennett, 19 Mo. 551; Linville v. Harrison, 30 Mo. 228.

[6] Sinclair v. Mo., K. & T. R. Co., 70 App. 588.

eral causes of action, founded upon so many distinct contracts for the transportation of lumber at different times, are joined in the same count, the defect is such that it may be taken advantage of even by motion in arrest.[1]

**§ 231. Same — Legal and equitable causes.**— While the Code permits the joining of legal and equitable causes of action, the rule applies here also that each cause of action must be separately stated, and the relief separately prayed, so that each may be separately tried, the one by the court and the other by jury, if a jury be demanded.[2] And their joinder in the same count would be fatally defective.[3] But though it is improper to mingle a cause which is purely equitable with one which is strictly legal in the same count, and proceed to try them together before a chancellor, it does not follow that a party must in all cases get his decree of title, and then bring a separate and independent action of ejectment to obtain possession.[4] If there should be such an improper mingling of legal and equitable causes in one count, and there is enough in the petition to show a good ground for equitable relief, the remainder of the petition may be treated as surplusage, or the chancery branch of the case may be rejected and a trial had as of an action at law.[5] It is not permissible to unite in one count a petition for the enforcement of a mechanic's lien against property owned by a married woman with one to charge other property belonging to the married woman, which is her separate property, with the payment of the debt. The enforcement of a mechanic's lien is a statutory proceeding triable by a jury, while the other branch of the case is purely equitable.[6]

**§ 232. Causes of action must be separately stated — Instances.**— There was one cause of action for damages done by defendant, a railroad company, to a brick building belonging to plaintiff by reason of the construction of a railroad track on defendant's own land, within three feet of the front wall of said building, and another cause of action for damages by reason of the trespass committed by defendant on plaintiff's land. These

[1] Hoagland v. Hannibal & St. J. R. Co., 39 Mo. 451.

[2] Bobb v. Woodward, 42 Mo. 482; Kabrich v. State Ins. Co., 48 App. 393.

[3] McCoy v. Yager, 34 Mo. 134; Myers v. Field, 37 Mo. 434; Peyton v. Rose. 41 Mo. 257; Hoagland v. Hannibal & St. J. R. Co., 39 Mo. 451; Thornton v. Irwin, 43 Mo. 153; Phillippi v. McLean, 5 App. 587.

[4] Henderson v. Dickey, 50 Mo. 161.

[5] Wynn v. Cory, 43 Mo. 301.

[6] Kern v. Pfaff, 44 App. 29.

two causes of action were set out in one count and therefore constituted a misjoinder, and plaintiff should have been compelled to elect.[1] A petition against a railroad company for killing stock, which unites in one count a cause of action for not maintaining fences, etc., and a cause of action at common law for not sounding the bell at the crossing, and a cause of action for negligence, is bad.[2] Damages for a permanent nuisance and for a temporary nuisance may be recovered in one action, but should not be stated in one count.[3] A cause of action based upon a settlement between plaintiff and defendant, and a promise by the latter to pay the amount thus found to be due the former, and one based upon the payment by plaintiff after the settlement of moneys for the use of defendant, are as distinct as if they grew out of separate transactions; and while they may be united in the same petition, they cannot be united in the same count. The payment of the sum after the settlement was in no way connected with the settlement, and could not be recovered in a lump with the amount of the settlement.[4] In a proceeding to establish a demand against the estate of a decedent for taxes which have accrued on personalty in the hands of the administrator, the taxes for each year should be set out in separate counts. If the taxes due for all the years are set out in one count, it is not a ground of demurrer, but defendant's remedy is by motion to require plaintiff to elect upon which cause of action he will go to trial.[5]

**§ 233. The different counts must be consistent.**— The rule which prohibits inconsistent defenses necessarily prohibits inconsistent counts. The office of pleading is to produce issues of fact or law, and as the proof in all cases must correspond with the allegations made, it would lead to the most absurd results if the plaintiff in support of one count of his petition were permitted to adduce evidence the tendency of which is to directly contradict his averments in another count.[6] The different counts in a petition are inconsistent when the proof of one count necessarily disproves the other.[7] A count for the breach of warranty

[1] Dougherty v. Wabash, St. L. & Pac. R. Co., 19 App. 419.

[2] Harris v. Wabash R. Co., 51 App. 125.

[3] Wallace v. Kansas City & S. R. Co., 47 App. 491.

[4] Brown v. Chadwick, 32 App. 615.

[5] State ex rel. v. Tittmann, 103 Mo. 553.

In connection with this subject § 215 *et seq.*, *ante*, should be consulted.

[6] Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287.

[7] Enterprise Soap Works v. Sayers, 51 App. 310; Suter v. Bischoff, 63 App. 157.

in the sale of personalty is inconsistent with another count based on the theory that such sale had been rescinded.[1] In an action against a railroad company for the killing of plaintiff's horse the statement contained three counts. In the first the injury was alleged to have resulted from the failure of the defendant to erect fences and cattle-guards where the road ran through inclosed fields; in the second, a similar failure where the road ran through uninclosed lands; and in the third, a failure to maintain a sufficient crossing over a public road. It was held that the counts were not inconsistent.[2] "A railroad," says Rombauer, J., "may run between inclosed fields and uninclosed lands at the same point, since fields may be inclosed on one side of it and uninclosed on the other. It could also, at the point where the stock came upon the track, run along a wagon road, and a liability might attach to the railroad company for not fencing its side towards the road, or for not maintaining the crossing of that road over its tracks. Either of these failures may have caused the injury, and plaintiff had a right to proceed for either or all together, though he was limited to a single recovery."[3] (p. 290.)

**§ 234. Each count must be complete in itself.**— Each count in a petition must stand as an independent statement, and each must contain all the allegations necessary to the statement of a cause of action.[4] This rule is the only safe one to follow, since if it is followed there can be no question as to the validity of the several counts. There is an especial risk in any other course, if there is danger that any one of the counts may be attacked by demurrer or motion, and may be pronounced insufficient. As any count thus adjudged bad is absolutely eliminated from the petition, and the petition stands as if it never had existed, if any of its averments are referred to in any other count, such reference manifestly becomes a nullity. Still the rule is not always adhered to in full strictness. Thus, it is held that when there are several counts, mere matter of inducement need not be stated in subsequent counts, if in the counts in which it is not restated there is an apt reference to the count in which it is stated; but

[1] Enterprise Soap Works v. Sayers, 51 App. 310.

[2] Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287.

[3] The averments of a petition must always be consistent, whether the petirton contains one or more counts. (See § 284, *post.*) That different defenses in an answer must be consistent is shown in chapter XIX (§§ 527–535).

[4] Boeckler v. Mo. Pac. R. Co., 10 App. 448; Clark v. Whitaker Iron Co., 9 App. 446; Russell v. Hannibal & St. J. R. Co., 83 Mo. 507; Weber v. Squier, 51 App. 601.

all the constitutive facts must be stated in each count.[1] And if the substance of the cause of action is sufficiently stated in one count, that count will support a verdict, though matters of inducement are not set out in the other counts except by reference.[2] So, too, it has been held that a fact once sufficiently stated in a petition need not be again repeated at length, but it is enough that it be intelligibly referred to, where there is occasion in the pleading to allude to it again.[3]

§ 235. Allegations in one count which are not necessary to explain or supplement allegations of other counts are not matters of inducement, but substantive averments of the first count.[4] If proper averments are made in the first count of a petition showing the corporate existence or powers of the parties to the action, those averments need not be repeated in subsequent counts.[5] An action was based upon a copartnership agreement between the parties that neither party should indorse the firm name on a note without the consent of the other. Several breaches of this contract were alleged in separate counts. In the first count the fact of the copartnership and the terms of the contract were set out, but these averments were not repeated in the subsequent counts. It was held that the subsequent counts were not thereby vitiated.[6] But in a much later case, where the first count of the petition set out a contract of sale and delivery of a certain quantity of ice during a certain period, and in the second count the petition averred that upon the making of "said contract" plaintiff paid a certain sum, it was held that the words "said contract," although referring to the contract set out in the first count, were not a sufficient statement of it, but that its date, consideration and subject-matter should have been set out in the second count as in the first; and the judgment was reversed on account of the insufficiency of the second count.[7]

§ 236. **The same cause of action stated in several counts.**— It is permissible to state the same cause of action in different ways in different counts, for the purpose of so varying the form of the statement as to meet any possible state of proof.[8] The pe-

[1] Bricker v. Mo. Pac. R. Co., 83 Mo. 391; St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495; Weber v. Squier, 51 App. 601.

[2] Neier v. Mo. Pac. R. Co., 12 App. 35.

[3] Ward v. Kelly, 7 App. 565. However, the case in which this doctrine is announced is not reported at length, and it cannot with safety be relied on.

[4] Alexander v. Lupe, 11 App. 597.

[5] Aull Sav. Bank v. Lexington, 74 Mo. 104.

[6] Stone v. Wendover, 2 App. 247.

[7] Weber v. Squier, 51 App. 601.

[8] Brinkman v. Hunter, 73 Mo. 172;

tition may count on a special contract and also on a *quantum meruit*, and plaintiff cannot in such case be compelled to elect on which count he will go to the jury.[1] And where the two counts of a petition refer to one and the same cause of action, a verdict on either count will bar a further recovery on both.[2] The rule can never apply except to cases where the various statements in the different counts are not necessarily inconsistent or contradictory; the rule which prohibits inconsistent defenses necessarily prohibits inconsistent counts.[3]

**§ 237. This practice not uniformly approved.**— But this practice of setting out the same cause of action in two or more independent counts is plainly repugnant to the theory of the reform procedure. It certainly ought not to have been allowed when the statute required the petition to be verified. And though the oath is not now required, yet the obligation to state the essential truth is as great now as it ever was, and sham counts are utterly at war with the spirit of the Code.[4] And this practice is not uniformly approved by our courts. The St. Louis court of appeals very properly says that it was one object of the practice act to remedy the falsity, as well as the injustice to the defendant, of stating one cause of action as many. There is no reason for the practice, since there is under the Code such facility of amendment that it is easy to secure, on the one hand, truth and consistency in pleading, together with the preservation of the defendant's rights, and, on the other, absence of any injury to the plaintiff arising from inability to tell in advance what substantive facts the evidence will present.[5] Even in cases where the practice is followed of stating the same cause of action in different counts, there can of course be but one recovery;[6] as, for instance, where a plaintiff combines a count on an express contract with one on a *quantum meruit* for the same cause of action.[7] And there must, in all cases of this character, be at least one good count by which the judgment may be supported.[8]

St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495; Burbridge v. Kansas City Cable R. Co., 36 App. 669; Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287.

[1] Globe L. & H. Co. v. Doud, 47 App. 439; Childs v. Crithfield, 66 App. 422. But the decision of the supreme court in Ehrlich v. Ætna Life Ins. Co., 88 Mo. 249, is apparently the other way.

[2] Burbridge v. Kansas City Cable R. Co., 36 App. 669.

[3] Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287. The case of Harris v. Pacific Exp. Co., 67 App. 175, may be considered in this connection.

[4] Druiding v. Lyon, 7 App. 199.

[5] Druiding v. Lyon, 7 App. 199. And this view is the one taken in the cases from New York and Ohio, cited in the opinion.

[6] Spurlock v. Mo. Pac. R. Co., 93 Mo. 530.

[7] Childs v. Crithfield, 66 App. 422.

[8] Terry v. St. L. & S. F. R. Co., 89 Mo. 586.

## CHAPTER XI.

### THE PETITION.


§ 238. General rules governing the petition.
240. Petition in equity.
241. Where there are several counts.
242. Form of the petition.
243. The statutory provisions.
244. The caption.
245. Stating the venue.
§ 246. Naming the parties.
248. Several defendants.
249. Where a firm sues or is sued.
250. Stating the character in which the party sues or is sued.
253. Showing the interest of the party.


**§ 238. General rules governing the petition.**— The fundamental requirement of good pleading, whether at common law or under the Code, is that the petition must be so drawn as to tender a definite issue or issues, and that it is not so obscure as to require the defendant to grope in the dark in order to ascertain its meaning.[1] A petition may be grammatically incorrect and yet be sufficient.[2] Under the former practice, where a bill in equity generally presented matters of evidence in order to sift the conscience of the defendant, and where it was for that reason verified by the plaintiff, it was proper that many facts should be stated upon information and belief. But under the Code such facts must now be set out as existing and constitutive facts, and if they relate only to evidential matters they must be omitted altogether. For that reason, among others, it is not permissible in a petition to make the charges rest upon the information and belief of the plaintiff. And if it were ever admissible under the former practice to charge fraud upon information and belief, that it cannot be done under the present practice is decided in *Nichols-Shepard Co. v. Hubert.*[3] If the plaintiff sues in a representative capacity, the petition must not only set out the facts showing his appointment and authority, but if the answer denies these facts they must be proved at the trial.[4]

[1] Huston v. Tyler, 140 Mo. 252.

[2] Parsons v. Mayfield, 73 App. 309. See § 242, *post.*

[3] 150 Mo. 620.

[4] Porter v. Hannibal & St. J. R. Co., 60 Mo. 160; Sherman v. Hannibal & St. J. R. Co., 72 Mo. 62; Randolph v. Hannibal & St. J. R. Co., 18 App. 609. Consult also § 250, *post.*

While our courts have always given a liberal construction to pleading under the Code, they have sternly set their faces against the attempt to sue on one cause of action and recover on another.[1]

§ 239. In all proceedings the christian and surname of both plaintiff and defendant should be set forth in the pleadings with accuracy.[2]

§ 240. **Petition in equity.**— When considering the question whether a bill in equity sets forth facts sufficient to constitute a cause of action, it must be borne in mind that in an equitable proceeding there is one essential element which does not exist in proceedings at law; and that is that the bill must state facts — not conclusions of law — which, if true, show that the case comes within some one or more of the branches of equitable jurisdiction. And the facts set forth must always show that the plaintiff has not an adequate remedy at law.[3]

§ 241. **Where there are several counts.**— Where there is more than one count in the petition, mere matters of inducement need not be restated in each count. But substantive facts, constituting the cause of action, must be set forth in each count; and the defects in one count cannot be supplied from the statements contained in another count.[4] The joinder of causes of action in different counts, and the method of setting forth the facts where there is more than one count in a petition, are fully discussed in chapter X.

§ 242. **Form of the petition.**— In a code system the statute looks first of all to the fact of a grievance demanding redress, and, asking no question about the particular form in which the demand is made, declares that one form, the civil action, shall suffice for any and every case wherein the grievance and the right of redress shall plainly appear.[5] A petition may be inartificially and clumsily drawn, and may even be incoherent, yet if taken altogether it states a cause of action, it is sufficient.[6] And such a petition is, unless objection to it is made by either demurrer, motion or answer, as valid to all intents and purposes as though prepared by the most skilful hand.[7]

[1] McCormick v. Interstate Consolidated Rapid Transit Ry. Co., 154 Mo. 191.

[2] Turner v. Gregory, 151 Mo. 100.

[3] Consult ch. XVI.

[4] Russell v. Hannibal & St. J. R. Co., 83 Mo. 507.

[5] Sumner v. Tuck, 10 App. 269, 276. See also Stillwell v. Hamm, 97 Mo. 579, 585.

[6] Lynch v. St. Joseph & S. R. Co., 111 Mo. 601; Putnam v. Hannibal & St. J. R. Co., 22 App. 589; State ex rel. v. Carroll, 63 Mo. 156. See § 238, n. 2, *ante*.

[7] Elfrank v. Seiler, 54 Mo. 134.

§ 243. **The statutory provisions.**—The petition should contain, *first*, the title of the cause, specifying the term, the name of the court, and the county in which the action is brought, and the names of the parties to the action, plaintiffs and defendants; *second*, a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition;[1] *third*, a demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money is demanded, the amount demanded must be stated, or such facts must be stated as will enable the defendant and the court to ascertain the amount demanded.[2]

§ 244. **The caption.**—The requirement that the term of the court must be specified[3] is a requirement as to form merely, and does not go to the cause of action or the jurisdiction of the court.[4] If the caption contains not only the names of the parties, but also a description of the capacity in which plaintiff sues or defendant is sued, this is mere *descriptio personæ*, and forms no part of the statement of facts which the petition is required to contain. If such description is confined to the caption, and there are no averments in the petition itself as to the character of the parties, or facts showing the right of the plaintiff to sue or of his right to hold the defendant in the character in which he is sued, this will be a fatal defect,—so fatal that, even though the petition is not attacked by demurrer and no motion in arrest is filed, yet the supreme court will notice it and reverse the judgment for that reason.[5] On the other hand, the fact that in the caption there is no proper statement of the parties or of the character in which they sue (or are sued) does not constitute a fatal defect, if there is in the body of the petition a substantial averment showing the capacity of the plaintiff to sue and to recover upon the cause of action stated.[6] And a description of plaintiff in the title as administrator may be wholly disregarded, if in the body of the petition there is a statement of sufficient facts to support a cause of action in favor of the plaintiff, either as an individual or in some other capacity.[7] So, too, in an action

[1] The original practice act contained also the following words: "and in such manner as to enable a person of common understanding to know what is intended." Laws 1849, p. 80, sec. 7.

[2] Rev. Stat. 1899, § 592.

[3] See the preceding section.

[4] Ryors v. Pryor, 31 App. 555.

[5] State to use v. Matson, 38 Mo. 489; State to use v. Bartlett, 68 Mo. 581. See also § 250, *post*.

[6] State to use v. Patton, 42 Mo. 530; Fuggle v. Hobbs, 42 Mo. 537. To same effect: State to use v. Bartlett, 68 Mo. 581.

[7] Fuggle v. Hobbs, 42 Mo. 537.

by the indorsee of a note, where the caption was "A. to the use of B., plaintiff, vs. C., defendant," but in the body of the petition the plaintiff A. alleged title in himself by indorsement from B., the words in the caption "to the use of B." may be regarded as mere surplusage.[1] And the omission of the name of a party defendant from the caption of an amended petition is immaterial, if the name appears in the body of such petition.[2] If the suit is brought by a trustee, it is not necessary that the name of the beneficiary should appear in the caption.[3] After verdict the caption may be resorted to in support of the verdict. Thus where the averments in a petition are made in the name of the state at the relation of a party, resort may be had after verdict to the caption to show that the relator is the guardian of the minor referred to, where, by reasonable intendment, a sufficient cause of action can be made out.[4]

§ **245. Stating the venue.**— The name of the county must in all cases be stated in the margin of the petition, and is taken to be the venue intended by the plaintiff; and it is not necessary to state the venue in the body of the petition or in any subsequent pleading.[5] The venue laid in the margin draws to itself all transitory matters alleged in the subsequent pleading.[6] In an action for injuring property situated on plaintiff's farm, it is not necessary to indicate the precise locality of the farm within the county.[7] If the cause is actually tried in the proper county, the failure to state a venue is cured by the statute of jeofails.[8]

§ **246. Naming the parties.**— Section 592[9] provides that in the title the names of the parties plaintiff and defendant shall be given. But all necessary description of the character of the parties must be contained in the petition itself.[10] If enough appears in the body of the petition to show the object of the suit, as well as the real party for whose use and benefit it is prosecuted, this is a substantial compliance with the statute.[11] The defendants in an action were designated as follows: "Missouri, Kansas & Texas Railway Co., a corporation; George A. Eddy and H. C. Cross, re-

[1] Beattie v. Lett, 28 Mo. 596.
[2] Wolff v. Ward, 104 Mo. 127.
[3] Phillips v. Ward, 51 Mo. 295.
[4] State ex rel. v. Crow, 8 App. 596. See also §§ 246–249, *post*.
[5] Rev. Stat. 1899, sec. 620; Palmer v. Mo. Pac. R. Co., 76 Mo. 217.
[6] Benton v. Brown, 1 Mo. 393.
[7] Palmer v. Mo. Pac. R. Co., 76 Mo. 217.
[8] Duncan v. Oliphant, 59 App. 1.
[9] Rev. Stat. 1899.
[10] Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418. See also § 244, *ante*.
[11] State to use v. Patton, 42 Mo. 530.

ceivers, defendants." It was contended that the suit was against the corporation and not against the receivers, or that at least it was against both the corporation and the receivers. But as the petition showed that the real defendants were the receivers, the action was held to be one against them alone, and not against the corporation.[1] A petition in partition by plaintiffs in behalf of an unincorporated church association must aver that the plaintiffs, as trustees of the church, sue for themselves and all other members of the church.[2] In an action by an infant the petition must show that the plaintiff is an infant, and sues by a guardian or next friend legally appointed.[3] But the averments of the petition in this regard may be supported, after verdict, by a reference to the caption, where, by reasonable intendment, a sufficient cause of action is made out in the petition itself.[4]

§ 247. If one had executed a bond in an assumed name, he could not, under the common law, have been sued by his true name, though the declaration may have contained an averment that he made the bond in an assumed name; but the rule is otherwise under the Code.[5] It follows necessarily that an action on a promissory note may be brought against a party in his true name, though the note was executed by him under an assumed name.[5]

§ 248. **Several defendants.**— Where an action founded on contract is brought against several defendants, plaintiff cannot be nonsuited because he fails to prove that all the defendants are parties to the contract, but he may have judgment against such of them as are proved to be parties to it.[6] This applies to an action against a firm.[7] In an action on a joint note plaintiff may dismiss as to one defendant without discharging the others.[8]

§ 249. **Where a firm sues or is sued.**— A suit cannot be brought in a firm name; the proper names of the plaintiffs must be set out.[9] Nor can a suit be maintained against a partnership in its firm name, in the absence of actual service on or appearance by its individual members. In no case will service by publication against a partnership in its firm name confer jurisdic-

[1] Proctor v. Missouri, K. & T. R. Co., 42 App. 124.

[2] Lilly v. Menke, 126 Mo. 190.

[3] Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418.

[4] State ex rel. v. Crow, 8 App. 596.

[5] Sanders v. Anderson, 21 Mo. 402.

[6] Rev. Stat. 1899, sec. 624; Crews v. Lackland, 67 Mo. 619; Ross v. McAnaw, 72 App. 99.

[7] Ferguson v. Huston, 7 Mo. 416.

[8] Brown v. Pearson, 8 Mo. 159.

[9] Revis v. Lamme, 2 Mo. 207.

tion over its members.[1] If the action is by the firm, the individual names should be set out in the body of the petition, otherwise the partnership must be proved.[2] But the petition is not demurrable if they are not so set out, provided they are given in the caption.[3] If partners are sued for a partnership debt, there need be no allegation of a partnership; an allegation that defendants are indebted is sufficient.[4] And in an action on a note payable to a firm it is not necessary to allege that the note was executed to the payees by their firm name.[5]

**§ 250. Stating the character in which the party sues or is sued.**— Where the plaintiff sues in a representative capacity, the allegations of the petition itself, independent of the caption, must show his authority to bring the action.[6] And the petition must show not only the nature of the claim, but the character in which the party makes the claim. If one sues as guardian he must so state, and cannot recover on a petition in which he seeks to enforce an individual right.[7] But the assignee of a note need not set out in the petition that he sues as assignee.[8] Where in the caption of the petition the plaintiffs style themselves executors, and in the body of the petition state that the note sued on was made to their testator, aver his death, and bring into court their letters and make profert of them, a demurrer on the ground that it is not alleged in the petition that letters testamentary were granted to plaintiffs by a court of competent jurisdiction should be overruled.[9] Where plaintiff sues in a representative capacity, the petition must not only set out the facts showing his appointment and authority, but, if the answer denies these facts, they must be proved at the trial.[10] In a suit brought by an infant, the failure of the petition to allege the appointment of a guardian or next friend to prosecute the suit constitutes an objection which goes merely to the legal capacity of the plaintiff to sue, and, if no objection is taken to it before the

[1] Johnson Machinery Co. v. Watson, 57 App. 629.

[2] Rev. Stat. 1899, sec. 746.

[3] Orr v. How, 55 Mo. 328.

[4] Gates v. Watson, 54 Mo. 585; Stix v. Mathews, 63 Mo. 371.

[5] Lee v. Hunt, 6 Mo. 163, which case overruled the earlier cases of Tabor v. Jameson, 5 Mo. 494, and Dyer v. Sublette, 6 Mo. 14.

See also the next preceding section.

[6] Headlee v. Cloud, 51 Mo. 301.

[7] Rhoades v. McNulty, 52 App. 301.

[8] Alexander v. Hayden, 2 Mo. 211.

[9] Bird v. Cotton, 57 Mo. 568.

[10] Porter v. Hannibal & St. J. R. Co., 60 Mo. 160; Sherman v. Hannibal & St. J. R. Co., 72 Mo. 62; Randolph v. Hannibal & St. J. R. Co., 18 App. 609.

trial, it is such an imperfection as is cured by the statute of jeofails.[1]

§ 251. A statement in a petition that plaintiff sues in the capacity of administrator is a sufficient allegation that he was administrator.[2] So a petition sufficiently shows plaintiff's right to sue as an administrator which alleges the death of his intestate, his appointment as administrator by a certain court, that such court had probate jurisdiction in the county in which the intestate died, and that plaintiff qualified and was acting as such administrator.[3] If plaintiff sues as administrator *de bonis non*, and the petition shows that the estate had, prior to plaintiff's appointment, been in charge of two persons as administrators, and then alleges that the letters of one of said persons had been revoked, but says nothing about the other, the petition is fatally defective.[4] In *State ex rel. v. Carroll*,[5] Carroll was removed as guardian and curator of a minor, and relator was appointed in his place. In an action on the bond the relator failed to state, as he should have done, that Carroll, the defendant, was duly appointed by the probate or county court having jurisdiction of the matter, but he did allege that Carroll was appointed guardian and curator in conformity to law in such cases made and provided. In connection with this allegation there was an averment that Carroll made his settlement in the Osage county court, the court having jurisdiction over the matter, and that the court approved the same. The supreme court held that, taking all these allegations together, they might be construed as amounting to an averment that Carroll was regularly appointed by the proper authority in Osage county. Says Wagner, J.: "No other inference can be drawn. The jurisdiction of the county court, and the proceedings therein as to the settlement, are alleged, and the averment of appointment must be construed in connection with them." (p. 158.) An allegation in a petition against a person who is of unsound mind that the co-defendant of the insane person is the duly appointed, qualified and acting guardian is a sufficient allegation of his appointment as guardian.[6]

§ 252. In an action against an officer it is not necessary to declare against him in his official capacity.[7] But if an adminis-

[1] Lyddon v. Dose, 81 App. 64.

[2] Duncan v. Duncan, 19 Mo. 368; Dodson v. Scroggs, 47 Mo. 285.

[3] Eans v. Exchange Bank, 79 Mo. 182.

[4] State to use v. Green, 65 Mo. 528.

[5] 62 Mo. 156.

[6] Wisdom v. Shanklin, 74 App. 428.

[7] Davis v. Cooper, 6 Mo. 148.

trator *de bonis non* brings an action upon the bond of his predecessor as administrator, he must allege in his petition the fact of defendant's appointment as administrator, though it is sufficient that such averment be made in general terms.[1]

§ 253. **Showing the interest of the party.**— Where the suit is brought by a husband and wife, the petition must show on its face the interest of the wife.[2]

[1] Dodson v. Scroggs, 74 Mo. 285.

[2] Haile v. Palmer, 5 Mo. 403.

## CHAPTER XII.

### THE PETITION — MULTIFARIOUSNESS.


§ 254. Is a defect under the Code.
255. Multifariousness defined.
256. The provision of the statute.
257. The limits of the rule.
§ 259. The averments are to be looked to, not the prayer.
260. Who may raise the objection.
261. Cases illustrating the above rules.


**§ 254. Is a defect under the Code.**— Multifariousness is a defect in pleading which has not been removed by the practice act.[1]

**§ 255. Multifariousness defined.**— It is impracticable to lay down any general rule as to what constitutes multifariousness as an abstract proposition, but each case must be determined by its own circumstances. Yet there are certain general rules which are well defined, though on account of the intricacy of the facts it is not always easy to apply them. It is said in *Stalcup v. Garner*[2] that "there are two kinds of multifariousness: first, where several distinct claims against the same defendant are combined in one suit, which is called a misjoinder of claims; secondly, where different matters, having no connection with each other, are joined in a bill against several defendants, a part of whom have no interest in or connection with some of the distinct matters for which the suit is brought; so that such defendants are put to the unnecessary trouble and expense of answering and litigating matters stated in the bill, in which they are not interested and with which they have no connection." (p. 73.) And again, that multifariousness is the joining in one petition of distinct and independent matters, each of which would constitute a cause of action.[3] But more properly speaking, a petition is multifarious where various matters having no connection with each other and against several defendants are joined, part of the defendants having no interest in or connection with some of the distinct matters for which the suit is brought.[4] In another case the supreme court

[1] Alexander v. Warrance, 17 Mo. 228; McQueen v. Chouteau, 20 Mo. 229; Doan v. Holly, 25 Mo. 357; Stalcup v. Garner, 26 Mo. 72.

[2] 26 Mo. 72.

[3] McGlothlin v. Hemery, 44 Mo. 350.

[4] Mayberry v. McClurg, 51 Mo. 256.

says that a bill is multifarious when distinct and independent matters are improperly joined, whereby they are confounded, as the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.[1] If a cause of action against A alone is joined with a cause of action against A and B, the petition is multifarious.[2] Therefore a bill will not lie against two defendants to set aside two deeds of trust, one of which is executed by both of the defendants and the other by only one of them.[3] And the case holds that this defect will not be cured by dismissing as to the party who did not execute the mortgage mentioned in the second count, if such party did execute the one mentioned in the first count, because he was a necessary party to a suit seeking to annul that mortgage. Mere redundant or irrelevant matter, which may be stricken out on motion, does not render a bill multifarious.[4]

§ **256. The provision of the statute.**— The statute expressly provides that where different causes of action are united in the same petition they must affect all the parties to the action.[5] In *Liney v. Martin*[6] there were two plaintiffs. The suit was based, so far as one plaintiff was concerned, upon an alleged collusion between one Newcomb, deceased, who was plaintiff's former husband, and the defendant Martin, with the intent to defraud such plaintiff of her dower interest in the real estate mentioned in the petition, and charging that the fraud was consummated by a pretended conveyance of the lands to the defendant. So far as the suit respected the other plaintiff, who was the minor heir of the said Newcomb, it was founded upon a charge that the same land was held by defendant Martin in trust for said Newcomb in his life-time; that at his death it descended to this plaintiff as his heir; that in fraud and violation of the trust defendant sold one of the tracts, and still holds the other under the fraudulent conveyance. It thus appeared that there was a suit in behalf of the latter plaintiff based upon the ground of a trust, created and arising out of a conveyance, which, to authorize a recovery, must be presumed to be valid and untainted with

[1] Clark v. Covenant Mut. Life Ins. Co., 52 Mo. 272.

[2] Doan v. Holly, 25 Mo. 357; s. c., 26 Mo. 186.

[3] Jamison v. Culligan, 151 Mo. 410.

[4] McGlothlin v. Hemery, 44 Mo. 350.

[5] Rev. Stat. 1899, sec. 593; Doan v. Holly, 25 Mo. 357.

[6] 29 Mo. 28.

fraud, and that it could not, therefore, be joined with a cause of action arising out of a transaction alleged to be fraudulent and based distinctly on that ground, which was the case of the first plaintiff. The petition was therefore held bad. It is also held that a cause of action against A alone cannot be joined in the same petition with a cause of action against B.[1] A landlord cannot maintain a joint action for rent against his tenant and for conversion against another person, who, with knowledge of the lien rights of the landlord, has bought the crop from the tenant and disposed of it.[2] Where a bill is filed by a judgment creditor to set aside certain mortgages on the ground that they were fraudulent as to creditors, the joining of a party as defendant who had no connection with the alleged fraudulent transaction between his co-defendants, and who has no interest in the mortgaged property, makes the bill multifarious.[3] So, too, a bill is multifarious if a claim against directors as such is included with a claim against them and others as stockholders.[4]

§ 257. **The limits of the rule.**— A bill in equity is not multifarious unless distinct and independent matters are united therein.[5] Distinct facts, forming a series of transactions tending to one common end, and all necessary to the plaintiff's equity, do not, when contained in a petition, make such petition multifarious.[6] And a petition setting forth several matters which are parts of the same transaction, in which all the defendants participate, and in the result of which all are interested, is not multifarious.[7] Nor is a bill to establish against several persons demands which are similar, based upon the same facts, and growing out of, and depending upon, the same principles.[8] A bill which seeks an account for rents and profits of real estate and an account of per-

[1] Stalcup v. Garner, 26 Mo. 72.

[2] Phillips v. Flynn, 71 Mo. 424.

[3] Wilkinson v. Goodin, 71 App. 394.

[4] Montserrat Coal Co. v. Johnson County Mining Co., 141 Mo. 149. This case was one where plaintiff brought suit against a corporation alleging its insolvency, and that he had recovered judgment against it for $60,000, and prayed that the other defendants, who were stockholders in the company, be decreed to pay $95 per share on each share of stock owned by them, because they had never paid but $5 on each share. The bill also prayed a judgment for $10,000 against the president of the company for money wrongfully appropriated by him, and for a judgment against him for whatever balance of said $60,000 should be unpaid after the other two sources should be exhausted. The bill also contained a prayer for damages for waste and wanton destruction of the mine, which the corporation had leased from plaintiff.

[5] Lindley v. Russell, 16 App. 217.

[6] McGlothlin v. Hemery, 44 Mo. 350.

[7] Mayberry v. McClurg, 51 Mo. 256.

[8] Martin v. Martin, 13 Mo. 36.

sonal estate is not multifarious.[1] Where three parties, each owning an estate in severalty, file a bill having a common object, viz., the removal of defendant from a trust pertaining to such estates, the plaintiffs having a common ground upon which they seek that object, and defendant's conduct toward the several plaintiffs and their property, and his relations with them, having been the same, such bill filed jointly by them is not multifarious.[2] All the persons who have a common cause of action and a common ground of relief against the defendant may join in the same bill.[3]

§ 258. If plaintiff bases his claim to equitable relief against several defendants on one general right, the petition is not multifarious, though the defendants may have separate and distinct defenses; as, where plaintiff sought to have certain conveyances set aside as being in fraud of creditors.[4] And if a debtor conveys land in fraud of creditors, and the title passes by different deeds to different persons, all such persons may be joined as defendants in a suit to set aside the deeds, as they all have a common interest in respect to the fraud. In such case the bill should be framed in one count as one cause of action.[5] But it seems that the bill must show a common purpose or design on the part of all the defendants.[6] The objection that the bill is multifarious will not hold where the *gravamen* of fraud or wrong in the sales is the same, and equally applies to all, notwithstanding that the defendants claim the land under distinct and separate sales of different parcels thereof to them separately.[7] And the same principle is announced in a much later case, where plaintiffs, as heirs of one Boggess, filed a bill to set aside two separate deeds, made to different persons and at different times by their ancestors, alleging that both deeds were made while the grantor was so feeble in health and his mind was so impaired that he was incapable of transacting business.[8]

**§ 259. The averments are to be looked to, not the prayer.**—Whether or not a petition is multifarious is to be determined not from the prayer, but from the allegations contained in it.[9]

[1] Rubey v. Barnett, 12 Mo. 3.

[2] Gartside v. Gartside, 113 Mo. 348.

[3] Michael v. St. Louis, 112 Mo. 610; Gartside v. Gartside, 113 Mo. 348.

[4] Donovan v. Dunning, 69 Mo. 436; Rinehart v. Long, 95 Mo. 396.

[5] Rinehart v. Long, 95 Mo. 396.

[6] Mullen v. Hewitt, 103 Mo. 639, 652.

[7] Bobb v. Bobb, 76 Mo. 419, the decision of the court of appeals on this point (8 App. 257) being reversed.

[8] Boggess v. Boggess, 127 Mo. 305. And an earlier case in which the principle is recognized is that of Barr v. Cubbage, 52 Mo. 404.

[9] Davenport v. Murray, 68 Mo. 198.

§ 260. **Who may raise the objection.**— If there is any defendant as to whom the bill is not multifarious, such defendant or defendants cannot raise the objection. It can be raised only by a defendant who is improperly joined.[1]

§ 261. **Cases illustrating the above rules.**— A, having an interest in the estate of B, conveyed it by deed to C as security. The deed was lost, and C, after the death of A, had his demand allowed against A's estate, and then filed his bill against the administrator of A, and of B, and the heirs of B. It was held that the bill was multifarious in joining the administrator of A, who had no interest in the proceeding against the administrator and heirs of B.[2] A petition to establish a debt against the estate of an intestate, and at the same time to charge lands in the hands of a third party on the ground that they had been conveyed by the intestate in fraud of creditors, is multifarious.[3] So, too, a bill against a judgment debtor and the grantees in a number of separate deeds alleging that they were each made to cover up the defendant's interest in the property described therein and to prevent the collection of plaintiff's judgment, but showing no common purpose or design, is multifarious.[4] And where A filed a bill charging that he had purchased a tract of land at an execution sale issued by the clerk of the circuit court upon a transcript of a judgment of a justice; that the defendant in the execution had previously conveyed the land to B; that the deed to B was fraudulent and void as to creditors, and was, though absolute upon its face, in fact a mortgage, the bill was multifarious in charging that the deed was a mortgage, and also fraudulent and void.[5] But where it is sought in the same proceeding to set aside an allowance of certain claims against an estate in favor of two persons, and also to set aside certain orders of sale of the real estate and the deeds to one of said parties under such sale on the ground of fraud, the petition is not multifarious.[6] And where children take lands as tenants in common, a petition which joins all those living and the heir of one deceased as parties defendant in a suit for partition is not multifarious, though some of the tenants have purchased the interests of the others, such purchase not conferring an exclusive right to any portion of the

[1] Boggess v. Boggess, 127 Mo. 305, 324.

[2] Berry v. Robinson, 9 Mo. 276. See, however, Rubey v. Barnett, 12 Mo. 3.

[3] Cheely v. Wells, 33 Mo. 106.

[4] Mullen v. Hewett, 103 Mo. 639. Compare Rinehart v. Long, 95 Mo. 396.

[5] Jones v. Paul, 9 Mo. 290.

[6] Mayberry v. McClurg, 51 Mo. 256.

land.[1] And if, in such a suit, the general right to the whole land is being litigated, the fact that the parties to the suit rely upon distinct and independent rights does not make the petition therein multifarious.[1] A suit against a trustee for the legal title of the trust property, and against the administrator on a demand growing out of the property, cannot be joined.[2] By the terms of a will the rents of certain real estate devised to a trustee were to be divided between certain persons named until the property should be sold, when the proceeds of the sale were to be divided among these and several other persons. A suit was brought to compel the trustee to account for rents collected and not paid over, to secure the removal of the trustee and the appointment of a successor, and to have the trust property sold and the proceeds divided. It was held that all the beneficiaries under the will were proper parties, notwithstanding that some of them had no interest in part of the relief sought, viz., the accounting for rents collected; and further, that a petition seeking such relief was not multifarious as to the latter class of plaintiffs.[3] A petition by infants, to whom slaves had been devised in trust, praying for the appointment of a new trustee, and also that certain parties who were charged with having wrongfully appropriated the services of such slaves might account to the new trustee, is not multifarious.[4] Nor is a petition in partition multifarious because it seeks to enforce against a third person a trust in the portion of the land claimed by plaintiffs.[5]

§ 262. **Further illustrations.**— Where the petition set forth that A conveyed a certain tract of land to B, and by mistake misdescribed it, and that B conveyed the same to C, and also, by mistake, misdescribed it, and there was a prayer for the correction of both deeds, the petition was multifarious.[6] A and B, by threats, extorted from C the transfer to themselves of a certain tract of land owned by the latter, one portion thereof being conveyed to A and the other to B; A conveyed his portion to D, who took with notice. C instituted an action against A, B and D to obtain an annulment of the deeds, and such joinder did not make the petition multifarious.[7] Where a person in anticipation of death, and with a view to defraud his widow of her dower, executed separate deeds of gift of slaves to his children,

[1] Waddell v. Waddell, 99 Mo. 338.
[2] McLaughlin v. McLaughlin, 16 Mo. 242.
[3] Goodwin v. Goodwin, 69 Mo. 617.
[4] Temple v. Price, 24 Mo. 288.
[5] Budde v. Rebenack, 137 Mo. 179.
[6] Stalcup v. Garner, 26 Mo. 72.
[7] Bray v. Thatcher, 28 Mo. 129.

a petition in a suit by the widow against all the grantees in said deeds, to obtain an annulment thereof and an assignment of dower, will not be multifarious.[1] A petition for the conveyance of land and possession thereof, and for the rents and profits, is not multifarious.[2] A bill in equity for specific performance of a contract for the sale of land, which charges first that the land was paid for in money, then that it was paid for in hogs, and that defendant obtained possession of the land by collusion with a third person, without making such person a party, is multifarious.[3] A delivered certain certificates of stock in different insurance companies to the complainant, and agreed, under seal, that upon the happening of a specified contingency the stock should become the absolute property of the complainant. Subsequently the same stock was sold on execution against A, as his property, to various purchasers. A bill, in which the several insurance companies and the several purchasers at the sheriff's sale were joined as defendants, and the object of which was to compel a transfer of stock on the books of the several companies to the complainant, was held to be multifarious.[4]

[1] Tucker v. Tucker, 29 Mo. 350.

[2] Duvall v. Tinsley, 54 Mo. 93; Kelly v. Hurt, 61 Mo. 463.

[3] Wilkson v. Blackwell, 4 Mo. 428.

[4] Ferguson v. Paschall, 11 Mo. 267.

## CHAPTER XIII.

### THE PETITION — STATING THE CAUSE OF ACTION.


§ 263. Facts should be stated.
264. Mode of stating the facts.
265. Waiving a tort.
266. Form and substance.
267. Must show a cause of action at time of commencing suit.
268. Certainty.
269. Answer may supplement petition.
270. What facts are constitutive.
271. Facts raised by legal implication.
272. The *ad damnum* clause.
273. Stating jurisdictional facts.
274. Where the cause of action is a statutory one.
276. Facts inferable from facts stated.
277. The test of sufficiency.
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§ 282. Exceptions to the rule as to proving unnecessary averments.
283. The allegations of the petition must be taken together.
284. Its averments must be consistent.
285. Pleading the legal effect.
286. Anticipating defense.
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293. Negativing affirmative matter.
294. Further illustrations of the rule.
295. Provisos and exceptions.
297. Where there is a condition precedent.
298. Where there are two covenants.
299. Cases illustrating the rule as to pleading a condition.
305. The rule applied to new matter in an answer.


**§ 263. Facts should be stated.**[1] — In *Farley v. St. Louis, K. C. & No. R. Co.*,[2] it is said that it is not at all necessary that the petition should state a cause of action, but only facts sufficient to constitute a cause of action; if the petition, however bunglingly drawn, contains the facts which make a cause of action, it is not obnoxious to the attack of a general demurrer or a motion in arrest, nor can it be attacked for the first time in an appellate court. (p. 341).[3] The statute provides that the petition must contain a plain and concise statement of the facts con-

[1] Under chapters IV to VII, inclusive, will be found many decisions relating to this subject, the stating of a cause of action in a petition. And those chapters should be consulted in connection with the present chapter.

[2] 72 Mo. 338.

[3] And this statement is again made in a later case. Alexander v. Campbell, 74 Mo. 142, 144.

stituting the cause of action, without unnecessary repetition.[1] Under the Missouri Code there is but one form for a civil action,[2] and the petition need only set out the facts constituting the cause of action,[3] whether such facts authorize legal or equitable relief.[4] Plaintiff should state the facts, and his ground of complaint arising on the facts.[5] And it must be borne in mind that the petition must state facts, and not the conclusions of the pleader from the facts.[6] Only the constitutive facts entitling the party to relief should be stated;[7] and if these averments include everything material to the plaintiff's cause of action this is sufficient.[8] The cause of action can be ascertained only by the allegations of the petition,[9] and the facts constituting the cause of action and the kind of relief sought must be set forth with precision.[10]

**§ 264. Mode of stating the facts.**— The facts need not be so stated as to show a right of recovery in any of the common-law forms of action.[11] But plaintiff must take care to state the facts as they exist. If goods have been taken under circumstances which constitute a trespass, there can be no recovery on a petition for goods sold and delivered.[12] But plaintiff need only state his cause of action in ordinary and concise language, whether the action be in *assumpsit*, trover, trespass or ejectment, without regard to the ancient forms.[13] A petition which contains a narrative of the facts of plaintiff's case, and of the wrongs and grievances of which he complains, with reasonable minuteness, is sufficient.[14] Section 604[15] permits a defendant to enter a denial of the allegations of the petition by asserting that he has no knowledge nor information thereof sufficient to form a belief; but, except in case of alternative pleading under the provisions of section 626,[15] such an averment is not good in a petition.[16] A

[1] Rev. Stat. 1899, sec. 592.

[2] Rev. Stat. 1899, sec. 539.

[3] Clark v. Clark, 86 Mo. 114; Knipper v. Blumenthal, 107 Mo. 665.

[4] Clark v. Clark, 86 Mo. 114.

[5] Ensworth v. Barton, 60 Mo. 511.

[6] Brown v. Cape Girardeau, 90 Mo. 377. That it is improper in a pleading to state conclusions of law, see chapter VII.

[7] Van Hoozer v. Van Hoozer, 18 App. 19.

[8] McNees v. Mo. Pac. R. Co., 22 App. 224. If the averments of the petition unnecessarily restrict the issues, the plaintiff may be confined to the limited issues. See § 282, *post.*

[9] Thrush v. Cameron, 21 App. 394; Russell v. McCartney, 21 App. 544.

[10] Bankston v. Farris, 26 Mo. 175.

[11] Ahern v. Collins, 39 Mo. 145.

[12] Link v. Vaughan, 17 Mo. 585. See the next section.

[13] Maguire v. Tyler, 47 Mo. 115.

[14] Mayberry v. McClurg, 51 Mo. 256.

[15] Rev. Stat. 1899.

[16] Citizens' Bank v. Tiger Tail Mill & Land Co., 152 Mo. 145.

mere allegation that defendant is informed and believes that a judgment debtor transferred his property to another for the purpose of defrauding and delaying his creditors is not a sufficient allegation on which to base a cause of action.[1]

**§ 265. Waiving a tort.**— In an early decision it was held that the Code does not authorize a person whose chattels had been taken away by a trespasser, or converted by a bailee, to waive the wrong and charge such person as a purchaser of the chattels.[2] But this ruling has not been followed, and the doctrine is now clearly recognized in this state that a plaintiff has the right to found his cause of action on the wrong, or to waive the wrong and sue as on an implied contract.[3] This question most frequently arises in connection with a counter-claim, and the reader is referred to chapter XXIV, where many additional cases are cited in discussing that question.[4]

**§ 266. Form and substance.**— While the use of formal and technical averments, which were necessary at common law to the statement of a cause of action, have been dispensed with by the Code and are no longer necessary, the same material allegations are necessary as at common law.[5]

**§ 267. Must show a cause of action at time of commencing suit.**— The petition must state a cause of action which accrued prior to the commencement of the action.[6] And it will not support a recovery if the facts stated, though true, do not show that the plaintiff had a subsisting cause of action at the date the suit was instituted.[7] But an amended petition may set forth facts occurring after the filing of the original petition, if the facts so averred are such as tend to strengthen and reinforce the original cause of action, and are of the same kind and cognate to those constituting the cause of action.[8]

**§ 268. Certainty.**— The rule that the constitutive facts and the relief sought should be set forth with precision is a fundamental one, which is recognized, without being expressly stated, in *Bankston v. Farris*.[9] The rule requiring certainty in a petition is for two purposes: *First*, that the adversary may know

[1] Nichols-Shepard Co. v. Hubert, 150 Mo. 620.

[2] Link v. Vaughn, 17 Mo. 585.

[3] Horine v. Bone, 69 App. 481. It is to be regretted that the earlier ruling has not been adhered to.

[4] See §§ 666–668, *post*.

[5] Citizens' Bank v. Tiger Tail Mill & Land Co., 152 Mo. 145.

[6] Brown v. Shock, 27 App. 351.

[7] Minor v. Rogers Coal Co., 25 App. 78.

[8] Alfter v. Hammitt, 54 App. 303. See also §§ 318, 627, 671 and 767, *post*.

[9] 26 Mo. 175.

exactly what he is charged with; *second*, that any judgment rendered on the petition may be such as can be pleaded by the defendant in bar of any subsequent suit for the same cause of action. If the petition is certain to such an extent as to accomplish these two purposes, it is sufficiently certain within the rule.[1] A pleading will not be held bad, at least after verdict, by reason of the fact that an amount of money is not expressed in words, but in figures preceded by the dollar sign and with the last two figures cut off by a dot to indicate cents.[2]

§ 269. **Answer may supplement petition.**— Where the averments of the answer are such as to supply the defects in the petition, such an answer in effect fills the purpose of an amended petition.[3]

§ 270. **What facts are constitutive.**— Every fact which the plaintiff must prove to maintain his suit is constitutive in the sense of the Code, and must be alleged.[4] Every fact of that character must be alleged, and so alleged that an issue may be made upon it.[5] Plaintiff need only allege such facts as he is bound to prove in order to make out his case in the first instance.[6] Whatever is the real ground of complaint ought to be distinctly stated.[7] If, however, enough is contained in the allegations of the petition to show that plaintiff has a cause of action, the petition will be held good after verdict.[8] And while the Code requires only the statement of the facts constituting the cause of action, and not of evidential facts, yet when the petition purports to state all the evidential facts upon which the cause of action is grounded, it must so state them as to show a cause of action in the plaintiff.[9] The rule at common law was that matters of aggravation did not constitute a part of the cause of action and

[1] It is unnecessary to cite authorities on this point, since the rule is applied under almost every head of this chapter.

[2] Fulenwider v. Fulenwider, 53 Mo. 439. See also § 38, *ante*.

[3] Allen v. Chouteau, 102 Mo. 309. The subject of curing a defective pleading by the pleading of the adversary will be considered in chapter XXXVII.

[4] Pier v. Heinrichoffen, 52 Mo. 333.

[5] Lanitz v. King, 93 Mo. 513; Beckman v. Phœnix Ins. Co., 49 App. 604; Harrison v. Kansas City, C. & S. R. Co., 50 App. 332; Benedict Mfg. Co. v. Jones, 60 App. 219; Rogers v. McCraw, 61 App. 407; Story v. American Central Ins. Co., 61 App. 534.

[6] Crane v. Mo. Pac. R. Co., 87 Mo. 588.

[7] Edens v. Hannibal & St. J. R. Co., 72 Mo. 212.

[8] Corpenny v. Sedalia, 57 Mo. 88.

[9] Bank of Little Rock v. Fisher, 55 App. 51.

need not be specially pleaded; and the rule is the same under the Code.[1]

**§ 271. Facts raised by legal implication.**—Facts raised merely by legal implication cannot, under our system of pleading, be considered constitutive facts necessary to be averred in order to state a cause of action.[2] Such constitutive facts are the actualities of the transaction. A legal implication from those actualities of other facts may authorize the use of such implied facts to defeat a recovery, but it cannot be essential to the statement of the cause of action, which arises, if at all, upon the statement of the actual facts.[3] If the contract relied on by plaintiff is express, it must be so pleaded, and the terms of the contract must be substantially set out. But if the contract is implied, the facts out of which it is claimed to arise should be pleaded, and it is then proper that the plaintiff, after stating the facts, should draw the conclusion that the contract was implied from them.[4] A case containing a pleading which violates the above rules is that of *Garner v. McCullough*.[5] There the petition averred as follows: "That plaintiff, in virtue of a contract with one E., was entitled to the exclusive possession of certain premises; that the premises, subsequently to the making of the contract, were purchased by the defendant with a knowledge of the plaintiff's rights, and that the defendant forcibly took possession of the premises and excluded the plaintiff." It will be seen that the petition utterly fails to show who E. was, and what his relation to the premises was; and it also fails to show the nature of the alleged contract. Moreover it does not aver that plaintiff was ever in possession of the premises, or that the defendant's acts were wrongful, and the contract with E. is not set out either in substance or in its legal effect. It is averred that plaintiff was entitled to the exclusive possession of the premises. But that states a mere conclusion of law. The defendant's motion to exclude all evidence offered by plaintiff was rightly sustained.

**§ 272. The ad damnum clause.**— Under the Code a petition is not defective because it does not contain an *ad damnum* clause,

[1] Pierce v. Carpenter, 65 App. 191.

[2] This does not mean that the court may not draw certain inferences of fact from the facts actually stated; but this subject is more fully discussed in section 276, *post*.

The courts of this state have not adhered to this rule in the matter of pleading an implied promise. But this exception is fully discussed elsewhere. See § 343, *post*.

[3] Duff v. Fire Ass'n, 129 Mo. 460.

[4] Wetmore v. Crouch, 150 Mo. 671. As to pleading an implied promise see § 343.

[5] 48 Mo. 318.

though under the old system it was perhaps a prerequisite to a judgment that the declaration should contain an allegation that the complainant had thereby been damaged, with a prayer for judgment for the amount of such damage. But as the Code requires only a plain and concise statement of facts, with a demand of the relief to which plaintiff may suppose himself entitled,[1] the petition is sufficient if the amount of damages is ascertainable from the facts alleged, and the plaintiff's estimate of them appears from the prayer.[2] If, however, the facts stated are such as are not necessarily followed by damage to the plaintiff, it then becomes necessary that the petition should contain an averment that he has been damaged. Thus, in *Perry v. Musser*,[3] it was alleged that defendant agreed to proceed with due diligence to collect certain notes which had formerly belonged to both the parties as partners, and that if the notes were not collected they were to remain the property of the parties, who were equally to bear the loss. It was then alleged that defendant did not use due diligence in presenting one of the notes, and that by reason of such failure he became liable to pay plaintiff the sum claimed. The petition, however, did not contain an averment that plaintiff sustained any damage whatever in consequence of the alleged neglect of defendant, or any facts from which damage or loss would be inferred. For this reason it was held that a demurrer to the evidence should have been sustained, the court saying that the mere failure to proceed with diligence to collect the note did not necessarily entitle plaintiff to a judgment, since there was no allegation that the maker of the note was solvent when it became due and became insolvent afterwards, and that plaintiff was therefore damaged by defendant's negligence, nor was there any other allegation which of necessity showed that damage resulted to plaintiff.[4]

§ 273. **Stating jurisdictional facts.**— At common law it was necessary in pleading the rendition of a judgment of an inferior tribunal, or that of a court of general jurisdiction in the exercise of a special jurisdiction, to aver all jurisdictional facts; but this has been changed by the practice act.[5] Now in pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but it is sufficient to state that such judg-

[1] Rev. Stat. 1899, sec. 592.

[2] Christal v. Craig, 80 Mo. 367.

[3] 68 Mo. 477.

[4] The rules as to stating the damages will be found *post*, § 317 *et seq.*

[5] State ex rel. v. Johnson, 78 App. 569.

ment or determination has been duly given or made; and if the allegation is controverted, the party pleading it must establish at the trial the facts conferring the jurisdiction.[1] In an action by a public administrator against his predecessor in office to recover assets not accounted for, a petition which avers an order of the probate court upon the defendant to pay and deliver such assets to plaintiff is sufficient within the foregoing section; it is not necessary to set forth the facts upon which the order was based.[2] But where a proceeding is had in the circuit court of St. Louis, or before one of the judges in vacation, for a condemnation of property for street purposes, the circuit court being in such cases in the exercise of a special jurisdiction not according to the common law, the facts which give the court jurisdiction must be set forth; that is, the petition must show that the ordinance providing for opening the street was passed either on the unanimous recommendation of the board of public improvements or on the petition of the owners of a major portion of the ground fronting on the proposed street.[3] And a petition for the opening of a private road must show that it is a way of necessity, otherwise the court has no jurisdiction to proceed.[4] The circuit courts of the United States being courts of general jurisdiction, it is not necessary, in suing upon a judgment of such a court, to set out the facts showing that it had jurisdiction of the cause.[5]

**§ 274. Where the cause of action is a statutory one.**— Where suit is brought upon a statutory cause of action it is only necessary that the petition should state facts which bring the case within the provisions of the statute, and a reference to the statute is unnecessary.[6] The rule applies to an action brought under the statute as to death resulting from personal injuries.[7] If, in an action upon a delinquent tax bill, the petition alleges that the taxes were duly levied, that is sufficient; plaintiff need not point out all the details of the revenue law and state a compliance with them.[8] So, in a proceeding against an insurance

[1] Rev. Stat. 1899, sec. 634.

[2] State ex rel. v. King, 76 Mo. 510.

[3] St. Louis v. Gleason, 89 Mo. 67.

[4] Colville v. Judy, 73 Mo. 651.

[5] Wonderly v. Lafayette County, 150 Mo. 635. It may be well to call attention to the fact that the distinction between want of jurisdiction and a mere omission to state a cause of action in a case where jurisdiction exists, is plainly marked both by the statute and in the adjudicated cases. State ex rel. v. Scarritt, 128 Mo. 331, 339.

[6] Kennedy v. Pacific R. Co., 45 Mo. 255.

[7] White v. Maxey, 64 Mo. 552.

[8] State to use v. White, 61 Mo. 441.

company for violation of a statutory provision requiring the filing of a statement with the insurance department, the petition is good if it uses the language of the statute in describing the statement required to be filed, and charges that such statement was not made and filed as required by law. The provisions of the statute need not be set out.[1] Where clerks of courts in counties having a population between thirty thousand and forty thousand are entitled to receive a salary of $2,250, it is not necessary for a clerk suing for his salary to allege what the population of the county is; it is sufficient for him to allege that his salary is $2,250.[2]

§ 275. Though a petition may not be good as a pleading framed on the statute, yet if it sets forth a good cause of action at common law it should not be dismissed.[3] Thus, a petition under the statute giving treble damages, which is defective in not containing the averments required by the statute, may yet state a good cause of action at common law for single damages.[4] In an action against a railroad company for burning plaintiff's hay, the fact that the petition alleges negligence on defendant's part will not make the action one at common law, if there is sufficient in the averments to bring it under the statute.[5]

§ 276. **Facts inferable from facts stated.**— Where a petition is attacked, at least after the answer is filed, and sometimes even when attacked by demurrer, the court will not only give effect to the allegations which are actually made in the petition, but will also treat as having been pleaded those facts which may be naturally and reasonably inferred from the facts which are alleged. This subject has been fully discussed in chapter VI, but I have thought it best to briefly consider it here also. Facts which are necessarily implied from the direct averments of the petition will be treated as though they had been in terms alleged.[6] And when certain facts are pleaded, inferences contrary to these facts are not to be considered.[7] In an action brought to recover money which had been deposited with a stakeholder, and had been paid by him to the winner of the bet, there was no direct averment in

[1] State v. Case, 53 Mo. 246.

[2] Lycett v. Wolff, 45 App. 489.

[3] Comings v. Han. & Cent. Mo. R. Co., 48 Mo. 512; Kneale v. Price, 21 App. 295.

[4] Atlantic & Pac. R. Co. v. Freeman, 61 Mo. 80.

[5] Walker v. Mo. Pac. R. Co., 68 App. 465.

[6] Weaver v. Harland, 48 App. 319.

[7] Carondelet Gas Light Co. v. Pratt, 7 App. 573.

the petition that defendant knew that the money deposited with him had been so deposited on a wager, but it did contain averments of the particulars of the wager, upon what election the money had been wagered, and that the money had been placed in the defendant's hands as stakeholder to abide the result of said election. These allegations were held to be sufficient, inasmuch as the fact that defendant knew that the money had been bet on the result of the election must be implied from the allegations.[1] Where a petition contains an allegation that an administrator in making a sale of property belonging to the estate failed to take a "note with security," this may properly be held to mean a note "with sufficient security."[2]

**§ 277. The test of sufficiency.**— The true test of the sufficiency of a petition is whether, if all the facts therein stated are true, the plaintiff is entitled to any relief.[3] And the petition is fatally defective if all the facts stated in it will not, even if true, warrant a recovery.[4] The facts set forth must be such as under the rules and principles of law would entitle the plaintiff to a judgment.[5]

**§ 278. Making unnecessary averments.**[6] — It not infrequently happens that a petition is so drawn as to contain averments which are unnecessary to the statement of the cause of action sued on. In such case the question is an important one, whether such unnecessary averments are mere surplusage, or whether, having been made, they become essential, so that proof of them will be required. It is not always easy to determine within which class any given case should fall. The fact that more is alleged than it is necessary for plaintiff to prove to entitle him to a verdict will not prevent his recovery, if he avers and proves

[1] Weaver v. Harland, 48 App. 319.

[2] State ex rel. v. Edwards, 78 Mo. 473. See also State ex rel. v. Carroll, 62 Mo. 156.

That facts raised by merely legal implication are not such constitutive facts as are necessary to be averred in order to state a cause of action is shown in § 271, *ante*.

That in actions to recover a penalty the statement cannot be helped out by intendment, see § 447, *post*.

[3] Wetmore v. Crouch, 55 App. 441; State ex rel. v. Pohlman, 60 App. 444; Ferguson v. Davidson, 65 App. 193. This point is also necessarily considered in the chapter on The Demurrer, which should be consulted. See ch. XXXII.

[4] State to use v. Bacon, 24 App. 403; Bank of Little Rock v. Fisher, 55 App. 51; Benedict Mfg. Co. v. Jones, 60 App. 219.

[5] Biddle v. Boyce, 13 Mo. 532. That the defects of the petition may be supplied by the answer, see § 269, *ante*, and also ch. XXXVII.

[6] In chapter VI it is shown that the

enough to make out his case,[1] unless the unproven allegations are such as are necessary to authorize a recovery.[2] A petition which states in effect that plaintiff delivered to defendant a horse to keep and train, that defendant agreed to take care of the horse and return it to plaintiff on demand, and that defendant failed to do so, states facts sufficient to constitute a cause of action, as proof of these averments would make a *prima facie* case for plaintiff; and though they are somewhat fuller than necessary, they are not so full as to impose on plaintiff the obligation of affirmatively proving that the failure to return the animal was the result of defendant's negligence.[3]

**§ 279. The rule illustrated.**— In actions based upon the statutory liability of railroad companies, plaintiffs sometimes include in their petitions an allegation of negligence—an allegation totally unnecessary, if the violation of the statute is made the ground of recovery. Thus, in *Radcliffe v. St. Louis, I. M. & S. R. Co.*,[4] which was an action for killing plaintiff's horse, and in *Campbell v. Missouri Pac. R. Co.*,[5] which was an action for the destruction of plaintiff's property by fire communicated from a locomotive, and in *Walker v. Missouri Pac. R. Co.*,[6] which was a case of the same nature as the last, the petition in each case contained an allegation of negligence, and in each case it was held that, though the averment of negligence was not proved, yet, as proof of negligence was not necessary to a recovery, plaintiff was entitled to a judgment if he proved the facts essential to the statutory liability of defendant. In *Morrow v. Surber*,[7] plaintiff, as county treasurer, brought an action to recover back money paid to defendant on a warrant after the funds against which the warrant was drawn had been exhausted. The petition not only contained the averment that the fund was exhausted when the warrant was paid, but also that the clerk who paid it was ignorant of that fact, and that he was also misled by the fraudulent misrepresentations of defendant's agent. The court held that the plaintiff, as an officer of the county, could not properly pay out the county funds on such a warrant, and that he was

statement of facts which are merely evidential is unnecessary. See §§ 128–130.

[1] Hartpence v. Rogers, 143 Mo. 623.

[2] Gannon v. Laclede Gas Light Co., 145 Mo. 502. This subject is also discussed in chapter V. See §§ 101, 102. See also §§ 565, 566, *post*.

[3] Casey v. Donovan, 75 App. 665.

[4] 90 Mo. 127.

[5] 121 Mo. 340.

[6] 68 App. 465.

[7] 97 Mo. 155.

entitled to recover in the action whether or not he proved the ignorance of the clerk and the fraudulent representations of defendant's agent. *Koopman v. Cahoon*[1] is a case where plaintiff had placed money in the hands of defendant as trustee, and, the purpose of the trust having failed, plaintiff sued to get his money back. The petition contained charges of fraud against the defendant, which charges plaintiff failed to substantiate by proof. It was held that, having proved the trust and the failure of its purpose, plaintiff could recover, notwithstanding he had not proved the fraud. And in this last case the court makes the broad statement that "under the reformed procedure the plaintiff is never to be deprived of his verdict and judgment merely because he has alleged too much. The surplusage may be rejected, and, if his petition is still good, then under the doctrine of aider by verdict he may keep his judgment, no other error appearing."[2] This was the rule at common law, it having been held in a very early case, decided many years before the adoption of the Code, that surplusage in a declaration may be stricken out, if there is then sufficient left for a good declaration.[3]

§ 280. Where an action is manifestly one at law, if a good cause of action at law is stated, it is not vitiated by adding other matters of equitable cognizance which were abandoned at the trial.[4] In a possessory action, allegations as to title are surplusage.[5]

§ 281. The charter of Kansas City provided that in an action on a special tax-bill it should be sufficient for the plaintiff to "plead the making and issuing of the tax-bill sued on, giving the date and contents thereof, filing the same, and allege that the party or parties made defendants own or claim to own the land charged, or some estate or interest therein." In an action on a special tax-bill the petition contained the further averment that the work for which the tax-bill was issued was well and faithfully done. It was held that, as plaintiff was not required to plead this fact, he was not required to prove it; and if defendant intended to defend on the ground that the work was not properly done, he must specially plead that defense, and not rely upon a general denial of the allegation in the petition.[6]

[1] 47 App. 357.

[2] Koopman v. Cahoon, 47 App. 357, 363.

[3] Crocker v. Mann, 3 Mo. 472.

[4] Floyd v. Gilkey, 29 App. 211.

[5] Gibson v. Chouteau, 7 App. 1.

[6] Guinotte v. Ridge, 46 App. 254.

**§ 282. Exceptions to the rule as to proving unnecessary averments.**— Yet there are cases in which a party will be held to prove an unnecessary averment; if he avers more than is essential to a recovery, and the additional averments are not immaterial, he may yet make them essential to his cause of action. An illustration of this is found in an early decision of the supreme court, where, in an action for breach of warranty of the soundness of an animal, the petition not only contained an averment that the animal was unsound, but a further averment that the disease constituting the unsoundness was glanders; and it was held that, though this last averment was unnecessary, yet as the pleader had thought proper to make the averment, he was bound to prove it, since unnecessary averments, unless they are immaterial, must be proved.[1] So, too, if plaintiff unnecessarily restricts the issues by his allegations, he will be bound to the issues thus limited.[2]

**§ 283. The allegations of the petition must be taken together.**— The allegations must all be taken together, and an allegation that defendant agreed to accept a certain sum in discharge of a debt must be controlled and explained by the entire petition, which shows that the cause of action is the breach of a contract.[3]

**§ 284. Its averments must be consistent.**— The averments of a petition must be consistent with each other.[4] Where in an action to recover damages for personal injuries the petition contained an allegation that plaintiff, while in the service of a railroad company, proceeded to uncouple a car, and that someone unknown to him caused the cars to be moved without notice to him, whereby he was injured, and then contained the further allegation that the failure of the company to have a proper system and proper rules regarding such matters was the direct cause of the cars being moved without notice to him, the two allegations are so inconsistent that they cannot stand together. Plaintiff alleged that he did not know who caused the train to move, from which it necessarily follows that he did not know why and how it was moved. If he did not know these facts, he cannot affirm that the movement was the result of the failure to establish rules.[5]

[1] Lindsay v. Davis, 30 Mo. 406. See also § 300; but compare § 294, note 7.

[2] Jackson v. Hardin, 83 Mo. 175.

[3] Larow v. Bozarth, 68 App. 406.

[4] Rutledge v. Mo. Pac. R. Co., 110 Mo. 312.

[5] Rutledge v. Mo. Pac. R. Co., 110 Mo. 312. That the different counts of a petition must be consistent is shown in ch. X, § 233.

**§ 285. Pleading the legal effect.**— In many instances, especially where the cause of action was founded upon a written instrument, the common law required that the facts should be pleaded according to their legal effect. It has been held in this state that it is sufficient to so plead them where the action is on a contract, and that, if the contract is evidenced by a writing, such writing need not be set out *in hæc verba*. But as this question has been fully discussed in chapter VII,[1] I will not pursue the subject further here, except to note a few cases illustrating the rule. Where an assignee of a bond brings an action on it against the obligor, he must set forth his title; it is not sufficient merely to aver that he is the legal holder of the bond.[2] If a party seeks to enjoin a sale under a deed of trust, it is not sufficient to merely allege that he does not owe the note secured by such deed. He must set up the particular ground upon which he relies, as that he has paid the note, or there was a want of consideration for it, or any equivalent matter.[3] Where one railroad company leases its road to another company, the lessor still remains liable for damages occurring on its road, though the lessee is also liable. In an action against the lessor it is not necessary to set out the lease and that the act causing the injury was done by the lessee, but it is sufficient to charge that the act was done by the lessor, which is said by the court to be pleading the legal effect.[4] In *Dougherty v. Matthews*,[5] which was an action to recover from an assignee of a lease certain rent which had accrued under the lease, the allegation of the petition was that defendant "assumed" the payment of the rent, while the writing offered in evidence stated that he "assured" its payment. It was objected that there was a variance. But the court held that it was immaterial that the agreement read "assured," while the petition used the word "assumed." "It was enough," says the court, "for the plaintiff to state it according to its legal effect." (pp. 522, 528.)

**§ 286. Anticipating defense.**— Where the averments of the petition disclose a *prima facie* defense to the cause of action set forth in the petition, it is necessary that such petition should contain averments of additional facts which go to avoid such defense; otherwise the pleading is bad.[6] But it is not necessary to

[1] See §§ 143–157.
[2] Smith v. Dean, 19 Mo. 63.
[3] Foster v. Reynolds, 38 Mo. 553.
[4] McCoy v. Kansas City, St. J. & C. B. R. Co., 36 App. 445.
[5] 35 Mo. 520.
[6] Bassett v. Western Union Telegraph Co., 48 App. 566.

aver a waiver of the performance of a condition in the contract.[1] Nor is it necessary to notice in the petition any conditions subsequent annexed to the right which plaintiff asserts, since the office of such a condition is not to create the right on which plaintiff bases his demand, but to qualify or defeat it; therefore such condition furnishes matter of defense which must be set up by the defendant.[2] The act of May 15, 1877,[3] relating to the enforcement of delinquent taxes by cities of the second class, provides that when any sale of real estate shall be discontinued, or when any real estate has been bid off for the city, and also in all cases when taxes have become delinquent before the passage of the act, suit may be brought in the name of the city to enforce the collection of the taxes. The statute further provides that it shall be sufficient to state in the petition the amount of the tax, the rate of interest and the date from which it is claimed, the property upon which the tax is charged, the owner thereof, and the year or years for which the tax is levied; or if it is a special tax, the date and title of the ordinance under which it is levied, and that such tax has not been paid. Such a petition is therefore good, though it fails to allege that the sale of the real estate has been discontinued, or that the real estate has been bid off for the city, or that the taxes became delinquent before the passage of the act.[4]

**§ 287. The question of anticipating the defense considered in adjudged cases.**— Where a bill is filed to set aside a sale under execution, the ground being that distinct parcels of land were sold in mass, it is not necessary for plaintiff to aver that he did not desire or direct the property to be sold in mass.[5] Where a

[1] Elfrank v. Seiler, 54 Mo. 134; Russell v. State Ins. Co., 55 Mo. 585.

[2] Menefee v. Bell, 62 App. 659. This case was an action on a special tax-bill for work done in Kansas City. The charter provided that if suit is brought on the tax-bill within two years, notice of such suit must be filed in the office of the board of public works within a certain time. The court held that it was unnecessary for plaintiff in his petition to allege that such notice had been given. "The failure to file notice of the suit in the office of the board of public works," says the court, "was new matter which defendant ought to have pleaded and proved. It was no part of plaintiff's case in chief. He established a *prima facie* right of recovery by the mere introduction of the tax-bill and proof of the assignment." (p. 663.) To the same effect is the decision in Seaboard National Bank v. Wright, 68 App. 144.

[3] Now sec. 5639, Rev. Stat. 1899.

[4] St. Joseph v. Kansas City, St. J. & C. B. R. Co., 118 Mo. 671.

[5] Kelly v. Hurt, 61 Mo. 463.

foreign insurance company brings an action in this state against a policy-holder to recover the cash premium, the petition is not defective because it fails to allege that plaintiff has complied with the law regulating the right of a foreign corporation to do business in this state.[1] In an action on an oral contract of insurance, it is not necessary that plaintiff should set out the terms and conditions which the law holds to be implied in such a contract and then allege their performance; if defendant relies upon the non-performance of any of such conditions, it must set up that fact as a special defense.[2] Where a contract was made by an individual with a firm composed of two persons, and an action was brought by one of the members of the firm, alleging that after dissolution of the partnership the contract had been assigned to him, the petition must allege that defendant recognized the contract after the dissolution and after receiving notice of the same; otherwise plaintiff will not be allowed to show facts by reason of which defendant was estopped to repudiate the contract.[3] If the petition sets up a contract which is good at common law, but voidable only for non-conformity to a statute, the petition is sufficient, and the non-conformity to the statute must be set up by the defendant as a ground of defense.[4]

§ 288. Where an action is brought on bonds which have been issued by a county under an act limiting the total amount to be issued, if the aggregate amount of the bonds sued on is less than the limitation, the petition need not allege that there was not an over-issue, since, if there was such an over-issue, this is a matter of defense.[5] Where the action is on the official bond of a constable for failing to notify plaintiff of his exemption rights, it is not necessary to aver that the money which was garnished and lost to the plaintiff was all the property the plaintiff had, nor that it, together with his other property, would not have exceeded in value the statutory exemption. If plaintiff did in fact possess other money or property at the time of the garnishment, it was for the officer to show that fact in defense.[6]

§ 289. Where the action is based upon negligence, the petition is not bad because it does not anticipate and negative facts which are proper matters of defense.[7] And plaintiff need not allege

[1] N. Y. Life Ins. Co. v. Stone, 42 App. 383.

[2] Duff v. Fire Ass'n, 129 Mo. 460.

[3] Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222.

[4] Gardner v. Armstrong, 31 Mo. 535.

[5] Catron v. Lafayette Co., 106 Mo. 659.

[6] State ex rel. v. Brady, 53 App. 202. See also § 296, *post*.

[7] Mangold v. St. Louis, I. M. & S. R. Co., 24 App. 52.

that he was at the time of his injury in the exercise of ordinary care, or that he was not guilty of contributory negligence, since the presumption is in this regard with the plaintiff, and the burden is upon the defendant to show such facts.[1] Where the action is to recover damages on account of an injury sustained while riding as a passenger in the caboose of a freight train on defendant's road, plaintiff need not set out the rules of the company and allege a compliance with them.[2] In an action against a telegraph company to recover the penalty for delay in delivering a message, it is not necessary that plaintiff should aver that he presented his claim for damages within sixty days; if such is not the fact, defendant must set it up and prove it.[3] In an action against a railroad company based upon its failure to fence its track, the petition need not contain an averment that the place at which the animal entered upon the tracks was not within the limits of an incorporated town or city.[4]

§ 290. Where there has been an arbitration, and the party in whose favor the award is made brings an action thereon, he need only set out so much of the award as shows his right to recover; if there is anything in the award constituting a defense, defendant must plead it.[5]

§ 291. Where in an action for malicious prosecution the petition admits that the plaintiff was convicted of the charge for which he was prosecuted, but it is alleged that, on account of the fraudulent practices of the defendants and their abuse of legal process, he was deprived of his principal witness, he thereby states a good cause of action.[6]

§ 292. Where in an equitable proceeding it becomes necessary for the plaintiff to show that his relief has not been barred by operation of the statute of limitations, owing to the fact of intervening disabilities, he must set out in his bill the facts which constitute the disability.[7] So, where facts appear in a petition in equity showing that plaintiff has been guilty of laches in asserting his claim, and there is an attempt on his part to excuse the delay, all the facts tending to establish such excuse must be definitely set forth.[8]

[1] Taylor v. Mo. Pac. R. Co., 26 App. 336.

[2] Whitehead v. St. Louis, I. M. & S. R. Co., 99 Mo. 263.

[3] Kendall v. Western Union Tel. Co., 56 App. 192.

[4] Meyers v. Union Trust Co., 82 Mo. 237. In connection with the cases cited in this section, consult §§ 409 and 454, *post*.

[5] Finley v. Finley, 11 Mo. 624.

[6] Boogher v. Hough, 99 Mo. 183.

[7] Keeton v. Keeton, 20 Mo. 530.

[8] Bliss v. Prichard, 67 Mo. 181.

**§ 293. Negativing affirmative matter.**— Where a person seeks to recover money wrongfully obtained, his petition must contain such averments as will exclude the idea that the money could have been obtained lawfully.[1] If a contract is by its terms to continue for a certain specific time, or until the rescission of a certain other contract, it is not necessary in an action on the contract that the petition should contain an averment negativing the fact that such other contract had been rescinded.[2] And where a statute provides that an action must be commenced within a certain time after the happening of an event, it is not necessary to allege that the action is commenced within that time, but it is sufficient to state the date of the happening of the event. The record of the cause will show whether or not the action was commenced within the requisite time.[3] If the gist of the action is the receipt of money, it is improper for the plaintiff to inferentially deny, by a negative averment, that the money has been received.[4]

**§ 294. Further illustrations of the rule.**— Where a mortgagee, after the mortgage has been foreclosed, and the mortgagee has become the purchaser, brings an action to recover a balance due on the note secured by the mortgage, it is not necessary that his petition should contain an allegation that, by the terms of the mortgage, the mortgagee was authorized to purchase.[5] If the action is against a married woman for a tort, it is not necessary that the petition should state that the tort was committed without the husband's consent or direction, since such consent or direction, if a matter of defense, is one which the wife should set up in her answer.[6] Where an action is brought upon a breach of warranty of soundness in the sale of a horse, a general allegation that the horse was unsound, without specification, is sufficient; and it is unnecessary to negative the idea that the defects were apparent.[7] Where a proceeding is instituted by the state to recover land which is claimed to have escheated to the state by reason of having belonged to a deceased alien, the petition must expressly negative the existence of those facts which, under the statute, entitled an alien or his heirs to hold

[1] Funkhouser v. How, 17 Mo. 225.

[2] Kitchen v. Cape Girardeau & State Line R. Co., 59 Mo. 514.

[3] Brandish v. James, 83 Mo. 313; Hayden v. Wolfing, 19 App. 353; Twitchell v. Devins, 45 App. 283.

[4] Sullivan v. Grace, 5 App. 594.

[5] Kingman v. Hill, 71 App. 666.

[6] Bruce v. Bombeck, 79 App. 231.

[7] Labeaume v. Poetlington, 21 Mo. 35.

the land. Thus, where the statute provides that an alien might own real estate if he had, at the time of receiving his conveyance, declared his intention to become a citizen of the United States, the petition must state that he had not made such declaration. And if the statute provides that an alien might devise the land, the petition must aver that he had not made such devise.[1]

§ 295. **Provisos and exceptions.**— The distinction between an exception in the purview of an act and a proviso is said to have been settled in this state. If the proviso furnish matter of excuse for the defendant it need not be negatived in the petition, but defendant must plead it. And in this view of the matter it makes no difference whether the proviso be contained in the enacting clause, or be subsequently introduced in a distinct form. It is the nature of the exception, and not its location, which ought to govern. Where, in the same section of the statute in which the right of action is given, the exception is contained, and it clearly appears that the plaintiff cannot maintain his cause of action without negativing the exception, then his petition must be so framed as to clearly show that the defendant is not within the exception. But if his right of action is complete under the statute, and there is a provision or exception, either in that or some other statute, which may be made available to defeat his right of action, then the matter must be taken advantage of by the defendant by way of defense.[2] A petition is not obnoxious to the objection that it does not state a cause of action because it is silent as to plaintiff's compliance with some extraneous statutory requirement.[3]

§ 296. In an action against a constable for attaching property exempt from execution, it is not necessary that the petition should aver that plaintiff was not a non-resident and was not about to remove out of the state with intent to change his domicile.[4] Where the action is based upon a policy of insurance which contains a general clause as to the amount of indemnity, but afterwards in a separate and distinct clause takes out of the general clause something which would otherwise be included in it, if the insured relies upon the general clause he need only set it out, without adverting to the separate clause operating as an exception.[5] In this case, which was an action upon an accident policy,

[1] State v. Killian, 51 Mo. 80.

[2] State to use v. Clark, 42 Mo. 519; Russell v. Hannibal & St. J. R. Co., 83 Mo. 507.

[3] Burdsall v. Davies, 58 Mo. 138.

[4] State to use v. Clark, 42 Mo. 519. See also note 6, p. 169.

[5] Crenshaw v. Pacific Mut. Life Ins. Co., 71 App. 42.

the indemnity fixed was $10 per week. There was, however, a subsequent clause which provided that the insured should not be entitled to indemnity in excess of his salary or the money value of his time. There was no evidence as to what his salary was, or the money value of his time, but it was held that *prima facie* he had the right to recover $10 per week indemnity, and that if defendant insisted that his salary or the value of his time was less than that, it should plead such fact and make proof of it.[1]

**§ 297. Where there is a condition precedent.**[2] — In pleading the performance of a condition precedent in a contract it is not necessary to state the facts showing such performance, but plaintiff may state generally that he duly performed all the conditions on his part. If such allegation is controverted the plaintiff must establish on the trial the facts showing performance.[3] It is necessary, however, that the petition should contain the general allegation of performance of a condition precedent prescribed in the statute, or some averment showing an excuse for its non-performance, otherwise it will be bad on demurrer.[4] If the petition avers in substance that the plaintiff kept and performed all the conditions and provisions of the contract to be kept and performed on his part, but that defendants failed to perform the same on their part, or if it is alleged that plaintiff tendered performance and it was refused, and damages are alleged, this is sufficient; it is not necessary to show actual performance, where tender of it is declined.[5] And an allegation that defendant hindered and prevented plaintiff from completing his contract, by throwing down a part of the work which plaintiff was to do, is a sufficient statement of an excuse for non-performance.[6]

**§ 298. Where there are two covenants.**— Where two covenants are independent, and have no reference to each other, the averment of the performance of one of them, where the action is based upon the other, will be considered immaterial, and an answer denying the performance of the immaterial covenant is demurrable.[7]

**§ 299. Cases illustrating the rule as to pleading a condition.**— Where in an action upon a policy of insurance the peti-

[1] See also, as illustrating the rule, the last citation in § 294, *ante*.

[2] That plaintiff need not notice a condition subsequent, see § 286, *ante*.

[3] Rev. Stat. 1899, sec. 634.

[4] Basye v. Ambrose, 32 Mo. 484; Beckman v. Phœnix Ins. Co., 49 App. 604; Ricketts v. Hart, 73 App. 647.

[5] Dobbins v. Edmonds, 18 App. 307.

[6] Little v. Mercer, 9 Mo. 218. See also, § 295, n. 3, *ante*.

[7] Simonds v. Beauchamp, 1 Mo. 589; Brand v. Vanderpool, 8 Mo. 507.

tion sets forth the terms of the policy, and follows with an allegation of due performance of all the conditions and obligations to be performed by plaintiff, such as notice of death, etc., it sufficiently pleads performance of all the conditions precedent;[1] and it is not necessary to specifically aver notice and proof of loss.[2]

§ 300. Where one has contracted to purchase stock from a corporation, and the payment of the money and the delivery of the stock were to be simultaneous acts, the company may commence an action for breach of the contract without averring an offer or readiness on its part to perform the contract by having the shares of stock ready for transfer and delivery. But if, instead of bringing such an action, it brings an action for the contract price of the shares, and avers its readiness to comply with the contract, this averment of readiness to comply becomes essential, and must be proved in order to a recovery.[3]

§ 301. In *Tower v. Pauly*[4] defendant contracted to place a furnace in plaintiff's house, and guaranteed that it should warm the house to seventy degrees in zero weather, and further promised that "if anything about the furnace is not understood, any alteration that should be necessary to accomplish the above (heating in zero weather) will be done free of charge." Plaintiff sought to recover under this warranty damages for the uncomfortable condition of his house, by reason of the fact that the furnace failed to heat the house as agreed, and further damages because of the cost of extra fires which he had to keep in the house for the same reason. These averments were stricken out by the trial court, that court holding that the warranty was conditioned upon the defendant's promise to make the necessary alterations free of charge. But it was held that this construction of the warranty was erroneous; that the warranty was not conditional, but absolute, and that the promise as to making alterations furnished the plaintiff a cumulative, and not an exclusive, remedy. It was also held that if the warranty had expressly stated that the reasonable and careful use of the furnace was a condition precedent to its complying with the warranty, it would have been incumbent on the plaintiff to aver that the furnace was thus used by him. But while that condition is implied, the omission to state in ex-

[1] Forse v. Supreme Lodge K. of H., 41 App. 106.

[2] Richardson v. North Missouri Ins. Co., 57 Mo. 413; Okey v. State Ins. Co., 29 App. 105; Rieger v. Mechanics' Ins. Co., 69 App. 674.

[3] St. Louis Raw Hide Co. v. Hill, 72 App. 142.

[4] 67 App. 632.

press terms in the petition that the furnace was thus used does not render the pleading fatally defective, since the petition did allege that the furnace was insufficient and incapable of heating said dwelling to seventy degrees in zero weather, and thus impliedly averred that it would not have done so though the furnace had been used reasonably and carefully by the plaintiff.

§ 302. Where an action is brought by a county on the bond of the county clerk for failure to report or account for the excess of fees collected by him over and above his salary and the pay of his deputies, it is not a condition precedent to recovery that the county court should have made an order on the clerk to pay over such fees, and therefore the petition is not defective because it does not allege that such order was made.[1] And in an action on the bond of a defaulting county treasurer, it is not necessary that the petition should aver that an order was made by the county court to turn over all balances to his successor, since such an order is not a condition precedent to the right of the county to sue.[2]

§ 303. In proceedings to open an alley, founded on an ordinance which provides that it shall be void unless the owners of a certain described strip of land shall dedicate such land for alley purposes within a given time, the petition must contain an aver ment of such dedication under the ordinance.[3]

§ 304. The rule as to pleading the performance of a condition precedent applies to a petition for the specific performance of a contract to convey land, and plaintiff need not in such a suit set out a compliance with each of the conditions precedent to a recovery. Thus a petition for specific performance of a contract to convey land need not aver that the cash payment was made as agreed, or that it was tendered, or that a deed of trust to secure the deferred payments was executed and tendered, though the contract contains all these provisions.[4] But if the action is one at law by the vendor of real estate to recover damages for a breach of the contract of sale, which contract provides that the title shall be perfect or no sale, a petition which fails to aver that the deeds tendered to defendant conveyed a perfect title is fatally defective.[5]

[1] State ex rel. v. Henderson, 142 Mo. 598; State ex rel. v. Chick, 146 Mo. 645.

[2] Clark County v. Hayman, 142 Mo. 430.

[3] St. Louis v. Cruikshank, 16 App. 495.

[4] Pomeroy v. Fullerton, 113 Mo. 440.

[5] Birge v. Bock, 24 App. 330.

A case in which it is held that the petition alleges the performance of every condition precedent to the right of recovery is that of Skeen v. Springfield Engine & Thresher Co., 34 App. 485.

§ 305. **The rule applies to new matter in an answer.**— In a case decided by the court of appeals the question arose on a counter-claim. The action was one to recover on a *quantum meruit* a reasonable price for constructing a building. Defendant set up a special contract between him and plaintiff, whereby the latter was, in case of delay in completing the building, to forfeit a certain sum daily. It appearing that this agreement of plaintiff was coupled with certain conditions, it was held that it devolved on the defendant to note those conditions in his answer, and to aver and prove facts consistent therewith which would tend to show plaintiff's liability; and if he failed to do so, he was not entitled to recover even nominal damages.[1]

[1] Connelly v. Priest, 72 App. 673.

## CHAPTER XIV.

### THE PRAYER FOR RELIEF.


§ 306. The petition must contain a prayer for relief.
307. The certainty required in the prayer.
308. Mistake as to the specific relief asked.
309. Both legal and equitable relief.
310. Prayer for general relief.
311. Where the judgment is by default.
312. Effect of the prayer as determining the character of the suit.
313. What relief may be asked.
314. Different kinds of relief.
315. Alternative relief.
316. Demanding interest.
317. Stating the damages.
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319. Stating the measure of damages.
320. General and special damages.
321. All damages included in one prayer.
322. Cases illustrating the rule as to general and special damages.
323. The rule in cases of slander or libel.
324. The rule in cases of personal injury.
325. Loss of time and earnings.
329. In cases of permanent injury.
330. Stating the *quantum* of damages.
331. Damages, actual and exemplary.


**§ 306. Petition must contain a prayer for relief.**—The petition must contain a demand of the relief to which the plaintiff supposes himself entitled; and if the recovery of money is demanded, the amount thereof must be stated, or such facts must be stated as will enable the defendant and the court to ascertain the amount demanded.[1] But, except where judgment is rendered by default, the court may grant plaintiff any relief consistent with the case made by him and embraced within the issues.[2] A demand for relief in accordance with the facts stated in the petition is an essential part of the petition.[3] It does not constitute a distinct cause of action, but only shows the particular remedy sought.[4]

**§ 307. The certainty required in the prayer.**—A petition is not open to demurrer if the facts stated in it entitle the plaint-

[1] Rev. Stat. 1899, sec. 592.
[2] Rev. Stat. 1899, sec. 776.
[3] Miltenberger v. Morrison, 39 Mo. 71; Peyton v. Rose, 41 Mo. 257; Rutherford v. Williams, 42 Mo. 18.
[4] Saline County v. Sappington, 64 Mo. 72; Whipple v. McIntyre, 69 App. 397.

iff to relief, though not to the relief prayed for.[1] But it is doubtful whether this rule should be applied as thus broadly stated where, upon the state of facts presented in the petition, different remedies may be applicable.[2] For, while the Code, no doubt, intended to abolish many distinctions with respect to forms of statement between actions at law and suits in equity, and to empower the same court (if necessary in the same proceeding) to adjudicate legal and equitable rights and apply thereto legal and equitable remedies, it does not sanction, and should not be so interpreted as to encourage, such vagueness and uncertainty in the petition as would leave the adverse party and the court in doubt as to the relief demanded, and hence as to the mode of trial and as to the issues which would be material and decisive in it.[3] And it would be a departure from the true spirit and meaning of the Code to require of plaintiff a plain and concise statement of the facts constituting his cause of action, without requiring at some stage of the case a plain statement of the judicial action demanded thereon, for the information of the defendant and for the court.[4] And the court emphasizes this view with the remark that "it seems to be imagined that any kind of judgment, whether legal or equitable in nature, that any particular facts alleged may warrant, should be given under our code of procedure, whether asked or not;" and adds: "We do not assent to that view."[5] The purpose of the ruling requiring the plaintiff to state the grounds upon which he expects judgment, and to specify the damages he seeks to recover with reasonable certainty, is to prevent surprise and to inform defendant of the exact scope of plaintiff's demand.[6]

**§ 308. Mistake as to specific relief asked.**— Notwithstanding the doctrine announced in the preceding section, if the petition fully sets forth facts constituting the cause of action, it is immaterial what the prayer is; the court will direct such judgment as the averments in connection with the facts proved will warrant.[7] For, under the statute,[8] the court may give any relief consistent with the allegations of the petition, without regard to what is

[1] Biddle v. Ramsey, 52 Mo. 153; Harper v. Kemble, 65 App. 514.

[2] Rush v. Brown, 101 Mo. 586.

[3] Ibid., p. 592.

[4] Ibid., p. 591.

[5] Ibid., p. 590.

[6] Mellor v. Mo. Pac. R. Co., 105 Mo. 455, 466. See also § 320, *post.*

[7] Gunnell v. Emerson, 80 App. 322; Liese v. Meyer, 143 Mo. 547. That alternative relief will not be granted, see § 315, *post.*

[8] Rev. Stat. 1899, sec. 776.

asked for.[1] Where the petition contains every allegation necessary to a recovery by plaintiff, the mere fact that the petition concludes with an improper prayer will not so govern the petition itself as to prevent the rendering of such judgment as is warranted by the facts alleged.[2] If the plaintiff makes out a case which entitles him to some relief in the power of the court to grant, though he may mistake as to the specific relief to which he is entitled, he will not be turned out of court, especially if he has one good specific request and a general prayer; all that portion of the prayer not warranted by the petition should be treated as a nullity.[3] But a petition setting up a contract by a married woman for the conveyance of land, and praying for specific performance and general relief, cannot be construed into a petition for a money judgment.[4]

**§ 309. Both legal and equitable relief.**— Plaintiff is entitled to all the relief which he could formerly have obtained upon the facts stated, both from a court of law and of equity.[5]

**§ 310. Prayer for general relief.**— Any relief appropriate to the facts alleged and proved may be granted under a prayer for general relief, whether asked for in an answer setting up affirmative matter or in a petition.[6] The plaintiff in an equity proceeding may, under such general prayer, have an accounting, if such accounting is appropriate to the action.[7] But parties are bound by their pleadings, and courts cannot give relief inconsistent with the statement of facts, and the admissions contained in them.[8] The mingling in a bill in equity with the prayer for specific relief of a prayer for general relief is not objectionable.[9] The above section [10] has no application where final judgment has been rendered for the defendant on demurrer.[11]

**§ 311. Where the judgment is by default.**— When there has been an interlocutory judgment by default, plaintiff cannot recover any greater damages or other relief than that which he shall have demanded in the petition as originally filed and served on the defendant.[12]

[1] Henderson v. Dickey, 50 Mo. 161. See, however, §§ 310, 311, *post*.

[2] Dickey v. Covenant Mut. Life Ass'n, 82 App. 372.

[3] McGlothlin v. Hemery, 44 Mo. 350.

[4] Rush v. Brown, 101 Mo. 586.

[5] Rankin v. Charless, 19 Mo. 490. See next succeeding section.

[6] Rev. Stat. 1899, sec. 776; Snider v. Colman, 72 Mo. 568; Bevin v. Powell, 83 Mo. 365; Conrad v. Howard, 89 Mo. 217.

[7] Young v. Powell, 13 App. 593.

[8] Ramsey v. Henderson, 91 Mo. 560.

[9] Clem v. German Ins. Co., 29 App. 666.

[10] Rev. Stat. 1899, sec. 776.

[11] Rush v. Brown, 101 Mo. 586.

[12] Rev. Stat. 1899, sec. 776.

**§ 312. Effect of the prayer as determining the character of the suit.**— It is often of importance to all concerned to know what relief plaintiff demands, in order to determine the proper constitutional mode of trial.[1] However, the character of the action is not always determined by the relief prayed for. Thus, if the petition sets out a good cause of action at common law, a demurrer will not lie because it asks for damages given by statute.[2] So, if a petition states consecutively and in connected form the facts constituting a legal ground of action, it does not become a bill in equity merely because the prayer improperly asks for equitable relief; but that part of the petition relating to the remedy, if separately stated, may be rejected as surplusage.[3] An action at law upon the bond of an executor will not be changed into an equitable proceeding by reason of the fact that the reply contains a prayer for equitable relief.[4]

**§ 313. What relief may be asked.**— If the petition contains but one count, and that is shaped as an action at law for damages, a prayer for an injunction is not proper.[5] Though the defendant shows himself entitled to a conveyance, but does not include in his petition a prayer that the title be vested in him, yet his right to hold the possession as against the party who is bound to make the conveyance is not impaired; but it is the better practice to ask the affirmative relief.[6]

**§ 314. Different kinds of relief.**— A bill to redeem is not objectionable because other relief is asked, if it be germane to the case made; and such relief may be given against each of several defendants occupying different attitudes toward the subject of the action as the position of each may warrant.[7] Where an action is brought for damages for the maintenance of a private nuisance, and the petition contains a prayer for an injunction to prevent its continuance, this is but a single cause of action for which double relief is asked; and it is erroneous to ignore the allegations of damages and to treat the case simply as one for an injunction.[8] A plaintiff will not be permitted to recover the

[1] Rush v. Brown, 101 Mo. 586, 591.

[2] Atlantic & Pac. R. Co. v. Freeman, 61 Mo. 80; Kneale v. Price, 21 App. 295; Comings v. Hannibal & Central Mo. R. Co., 48 Mo. 512.

[3] Brown v. Home Savings Bank, 5 App. 1; Henderson v. Dickey, 50 Mo. 161.

[4] State ex rel. v. Jones, 131 Mo. 194. See the next section.

[5] Smith v. Sedalia, 152 Mo. 283. Compare Whipple v. McIntyre, 69 App. 397.

[6] Barker v. Circle, 60 Mo. 258. See also § 310, n. 8, *ante*.

[7] Stillwell v. Hamm, 97 Mo. 579.

[8] Whipple v. McIntyre, 69 App. 397. See in this connection Smith v. Sedalia, 152 Mo. 283.

fruits of an illegal transaction, and at the same time and in the same suit obtain the benefit of a decree annulling the transaction. Therefore where he seeks to recover upon certain certificates issued by a bank, and at the same time attacks for illegality the transaction upon which the certificates were issued and asks for equitable relief, and the appointment of a receiver to wind up the business of the bank, the two positions are so repugnant as to render the petition bad.[1]

**§ 315. Alternative relief.**— If there is a prayer for an alternative relief founded upon the assumption that the cause of action is wholly misconceived, it cannot be granted.[2]

**§ 316. Demanding interest.**— The rule that in an action at law the damages must be stated at some definite amount, and that plaintiff will be limited to the damages which he claims,[3] extends to the case of interest, and interest cannot be recovered unless claimed, except in some few instances where the statute specifically makes it a part of the damages.[4] In an action on an account, interest must be claimed in the petition in order to entitle plaintiff to recover it;[5] and the rule applies to actions for conversion.[6] The case of *Girvin v. St. Louis Refrigerator Co.*[7] was an action to recover for timber sold and delivered to defendant. The petition alleged that the timber was of the contract price of $441, and claimed damages in the sum of $458.50, but contained no prayer for the allowance of interest. It was held that the allegations of the petition did not warrant a judgment for any greater sum than $441, and that a judgment for interest was excessive and erroneous. If, in an action upon a policy of insurance, the prayer does not include a demand for interest, none can be recovered.[8]

**§ 317. Stating the damages.**— If the recovery of money is demanded in the petition the amount demanded must be stated, or such facts must be stated as will enable the defendant and the court to ascertain the amount demanded.[9] In an action at law the damages must be stated at some definite sum, and plaintiff

[1] Mansfield v. Bank of Monett, 74 App. 200.

[2] Robinson v. Rice, 20 Mo. 229; Pensenneau v. Pensenneau, 22 Mo. 27.

[3] See § 317.

[4] Van Riper v. Morton, 61 App. 440.

[5] Patterson v. Missouri Glass Co., 72 App. 492; State v. Gold Spring Distilling Co., 72 App. 573.

[6] Horner v. Mo. Pac. R. Co., 70 App. 285.

[7] 66 App. 315.

[8] Shaver v. Mercantile Ins. Co., 79 App. 420.

[9] Rev. Stat. 1899, sec. 592. That an *ad damnum* clause is not necessary, see § 272, *ante*.

will be limited to such damages as he claims in his petition. And any judgment in excess of the sum claimed is erroneous.[1] If the prayer for judgment leaves the amount blank, as, for instance, "Plaintiff prays for $——," it is questionable whether it will support a judgment for anything more than nominal damages.[2]

§ 318. **Stating the damages — Continuing damages.**— If the damages continue during the progress of the cause, plaintiff may, in his reply to the new matter contained in the answer, allege the additional damages and recover them.[3] And he may also do this by a supplementary petition.[4]

§ 319. **Stating the measure of damages.**— It is not necessary that the petition should contain any allegation as to the measure of damages in the action or as to the *quantum* of damages, since that is a matter to be regulated by the court in its instructions.[5] The case last cited was an action for injuries to plaintiff's realty resulting from the damming up of a stream, and thereby causing it to overflow plaintiff's quarry. It was contended that the petition, though it contained all necessary allegations to constitute defendant's liability, was defective because it neither stated a cause of action for permanent injury to the land, since it did not allege the value of the land just before the overflow and its value thereafter, nor a cause of action for a temporary injury, by reason of the fact that it did not allege the rental value of the land from the date of the overflow to the commencement of the action. But though it was held that in such cases the measure of damages is the difference between the market value of the land immediately before the injury occurred, and such value after the injury was complete, it is yet not necessary to allege in the petition what the respective values were at those different periods, but it is sufficient that the petition should charge the entire damage to be one gross sum.[6]

§ 320. **General and special damages.**— Where the damages are general, the wrong itself fixes the right of action. But special damages must be pleaded with a reasonable degree of particularity; and it must appear that the damage claimed is the natural though not the necessary consequence of the wrong.[7]

[1] Horton v. St. Louis, I. M. & S. R. Co., 83 Mo. 541; Carter v. Shotwell, 42 App. 663; Coles v. Foley, 13 App. 249. See § 311, *ante*.

[2] Carter v. Shotwell, 42 App. 663.

[3] St. Joseph Union Depot Co. v. Chicago, R. I. & Pac. R. Co., 131 Mo. 291.

[4] Ward v. Davidson, 89 Mo. 445.

[5] Gerdes v. Christopher Arch, I. & F. Co., 124 Mo. 347; St. Louis Trust Co. v. Bambrick, 149 Mo. 560.

[6] St. Louis Trust Co. v. Bambrick, 149 Mo. 560.

[7] Brown v. Hannibal & St. J. R. Co.,

If the law does not necessarily imply that a plaintiff must sustain damage by the act complained of, it is essential that the resulting damage should be shown with particularity, and it must be specially pleaded.[1] If the damages are directly connected with and incidental to the injury, a general allegation that plaintiff was injured by reason of the wrongful act of defendant, stating the nature of the injury and the time and the place of its occurrence, is all that is necessary to permit proof of such injuries; but when special damages are claimed, the facts showing the special damage must be alleged.[2] The rule, both at common law and under the Code, is that matters of aggravation do not constitute part of the cause of action, and evidence of them is admissible though they are not pleaded.[3]

**§ 321. All damages included in one prayer.**— A plaintiff may include in one count his claim for general as well as for special or consequential damages, because, although the damages are of a different class, the cause of action is the same.[4]

**§ 322. Cases illustrating the rule as to general and special damages.**— In an action of trespass for tearing down and removing plaintiff's fence, evidence tending to show that the plaintiffs were deprived of the use of certain pasture land which belonged to the farm is not admissible, unless it is specially pleaded.[5] In an action of replevin special damages must be specially pleaded; a general claim of damages will only entitle plaintiff to recover such damages as are the natural and immediate result of defendant's acts.[6]

**§ 323. The rule in cases of slander or libel.**— In actions for libel, if plaintiff seeks to recover special damages, such special damages must be set forth with particularity.[7] But if no cause of action is stated, an allegation of special damages will be worthless.[8] If in an action for slander the words used are not actionable in themselves, but the ground of the complaint is that plaintiff has been injured in respect to his character, reputation or business, he must aver that the words were spoken in reference to one of these, and special damages must be alleged.[9] If the slander

99 Mo. 310; Barrett v. Western Union Tel. Co., 42 App. 542. See § 307, *ante*.

[1] State to use v. Blackman, 51 Mo. 319.

[2] Burkeholder v. Rudrow, 19 App. 60; Dooley v. Mo. Pac. R. Co., 36 App. 381; Coontz v. Mo. Pac. R. Co., 115 Mo. 669.

[3] Pierce v. Carpenter, 65 App. 191.

[4] Connoble v. Clarke, 38 App. 476.

[5] Macy v. Carter, 67 App. 323.

[6] Burkeholder v. Rudrow, 19 App. 60.

[7] Hermann v. Bradstreet Co., 19 App. 227.

[8] Legg v. Dunlevy, 10 App. 461.

[9] Curry v. Collins, 37 Mo. 324.

relates to the business of plaintiff, a diminution or loss of business may be proved, if there is a general allegation to that effect; and it is not necessary to name the particular customers who have ceased to do business with the plaintiff.[1] Words which are not in themselves actionable when spoken of a person in his individual character may become so when spoken of the person in relation to his employment or business. In such case no special damages need be alleged. But to make them thus actionable, when no special damage is laid, the petition must show on its face that the words were spoken of the person in relation to his employment or business. And there is no distinction recognized by the authorities in this respect between a learned profession and a mechanical trade.[2] Where the petition states that defendant sent to plaintiff's customers a circular letter telling them that plaintiff had no right to make and sell certain articles in which he dealt, and alleges that such statement was false and malicious, was made with the intent to injure plaintiff, and that by reason of the letter plaintiff's customers had ceased to buy from him, thereby injuring and damaging him in his trade and business and property rights, it states a good cause of action.[3]

§ 324. **The rule in cases of personal injury.**— If the damages are directly connected with and incidental to the injury, a general allegation that plaintiff was injured by reason of the wrongful act of defendant, stating the nature of the injury and the place of its occurrence, is all that is necessary to permit proof of such injuries; but when special damages are claimed, as for loss of services and the incurring of medical bills, such special damages must, in order to allow proof of them, be alleged in the petition.[4] Evidence of physical pain and mental anguish in connection therewith is admissible, though the petition contains no special allegation as to them.[5] But the amount of a doctor's bill, incurred in consequence of a battery, cannot be recovered unless the petition specially sets it out.[6] All the damages recoverable by an infant for the death of its parent under section 2866[7] are in the nature of general damages, and need not be specially pleaded.[8] And in an action by the father or mother

[1] Noeninger v. Vogt, 88 Mo. 589.

[2] Bray v. Callihan, 155 Mo. 43.

[3] Meyrose v. Adams, 12 App. 329. Consult also § 464, *post*.

[4] Burkeholder v. Rudrow, 19 App. 60; Dooley v. Mo. Pac. R. Co., 36 App. 381; Coontz v. Mo. Pac. R. Co., 115 Mo. 669.

[5] Brown v. Hannibal & St. J. R. Co., 99 Mo. 310.

[6] O'Leary v. Rowan, 31 Mo. 117.

[7] Rev. Stat. 1899.

[8] Ellingson v. Chicago & Alton R. Co., 60 App. 679.

for the death of a minor child it is not necessary that the petition should contain an allegation of loss of services in order to recover for them.[1]

§ **325. Loss of time and earnings.**—The question whether loss of time and loss of earnings can be shown under a general allegation of loss or injury has been repeatedly before our courts, and the decisions are apparently somewhat in conflict. In a case against a railroad company, decided in 1891, it does not appear what were the precise allegations of the petition. The court, however, declares the law to be that loss of earnings is a kind of injury which is not regarded as a necessary consequence of such acts as are complained of, and, therefore, is not embraced within the plaintiff's general allegations of damage. It is one sort of special damages, and consequently must in some wise be counted upon to constitute a basis for evidence on the subject. The purpose of this rule is to prevent surprise and to inform defendant of the exact scope of plaintiff's demand.[2] The above case was decided by the supreme court *in banc*. In 1893 the question came before division No. 2 in a similar case, where the allegation in the petition was that plaintiff had been permanently disabled from labor. The court holds that this is the same question which was adjudicated in the *Mellor* case,[2] and says there is no apparent difference with respect to the allegations in the respective petitions, and follows the ruling in the *Mellor* case, using this language: "Where the damages are directly connected with and incident to the injury, the general allegation that the party suing has been injured by reason of the wrongful act of defendant, stating how injured, and when and where it occurred, is all that is necessary in order to permit proof of such injuries; but when special damages are claimed, as for loss of services and medical bills, in order to permit the introduction of evidence in regard thereto, they must be alleged in the petition."[3] In the same year a case came before the same division in which the allegation was that "the injury is permanent, and will render plaintiff a cripple for life." That division of the court held that evidence as to loss of time and earnings was not admissible under such an allegation, and that an instruction covering that element of damages was erroneous.[4]

[1] Hennessy v. Bavarian Brewing Co., 145 Mo. 104.

[2] Mellor v. Mo. Pac. R. Co., 105 Mo. 455.

[3] Coontz v. Mo. Pac. R. Co., 115 Mo. 669, 674.

[4] Slaughter v. Metropolitan Street Ry. Co., 116 Mo. 269.

§ 326. In a case which came before the Kansas City court of appeals, the petition contained a similar allegation, to wit, that in consequence of the injuries plaintiff was then, and would be for life, "a cripple and invalid, and unable to work, and is thereby compelled to abandon forever his ordinary vocation, and is totally disabled and permanently injured, and left a physical wreck, and has, from said day until the present, been unable to attend to any business." This allegation was held to be sufficiently broad to allow for a recovery for loss of time.[1] The next case in the supreme court was decided by division No. 1. There the allegation was that plaintiff, "by reason of said wounds and hurts, has suffered great pain and anguish, and has been deprived of the means of her support." Under that allegation it was held that plaintiff had the right to give evidence of her earnings in the usual course of her business.[2] The next case in the supreme court was decided by division No. 2. It is that of *Britton v. St. Louis*.[3] The allegation there was that the injuries were such as to permanently impair the future use of plaintiff's leg; that they disabled him, caused his confinement in bed and for a long time in the house, and incapacitated him for work and labor ever since; that besides loss of time he was put to great expense in the treatment of the injuries incurred. There it was held that, as no objection was made to the admission of evidence showing that he was a day laborer, depending on his work for a living, the objection that the pleading was not sufficient to warrant an instruction that he might recover for loss of time came too late, the court adding: "The allegation, while indefinite, is sufficient notice of his claim for damages for loss of time as one of the consequences resulting from his injury." (p. 446.) And the above case of *Smith v. Railroad Co.*[2] is cited as an authority.[4]

§ 327. In 1894, in a case also before division No. 2, the averment, following the statement that plaintiff's thigh and leg were crushed, was "that, by reason of said injuries, plaintiff had suffered great bodily and mental anguish, and has been unable to follow his business, or to perform any kind of labor." It was

[1] Loe v. Chicago, R. I. & Pac. R. Co., 57 App. 350.

[2] Smith v. Chicago & Alton R. Co., 119 Mo. 246.

[3] 120 Mo. 437.

[4] On the same ground a like allegation was held sufficient in Golden v. Clinton, 54 App. 100. Neither of these two authorities last cited is in any way repugnant to the current of decisions, since the failure of defendant in each of them to object to the evidence furnished a sufficient reason for affirming the judgment of the court below.

held that under this allegation plaintiff was properly permitted to show the effect which the injury had on his capacity and ability to follow his business, and to perform any kind of labor. And it is said by the court that neither the case of *Slaughter v. Railroad*,[1] nor that of *Coontz v. Railroad*,[2] is in conflict with the decision.[3] In the same year the question came again before the court, this time in division No. 1. The statement of the damages in that case was as follows: "Whereby he has been permanently disabled from performing labor, and has been made a cripple for life, has suffered great pain of mind and body, and he is unfitted for carrying on his vocation, and he has lost, and will lose, the earnings of his labor." This was followed by a general allegation of damages. The court held that the petition clearly counts specially on the loss of earnings as an element of damages, and that it is not necessary to allege the *quantum* of such damage. There can be no question of the correctness of this decision, since special damages were clearly alleged. But the court, after citing the *Mellor* case, adds that "it is clearly inferable from these decisions that evidence of damages for loss of earnings is admissible under a general averment of such loss;[4] a *dictum* which it is not easy to reconcile with the preceding decisions. In *Bartley v. Trorlicht*,[5] the St. Louis court of appeals holds that the above cited case of *Mellor v. Railroad*,[6] and the cases which follow it as an authority, are applicable only where it is sought to recover past earnings, but that the rule does not extend to a case of loss of future earnings, that is, to the damages which may be supposed to accrue from an impaired earning capacity through a total or partial disability." "It has never been the practice," says Thompson, J., "in drawing petitions in actions for damages for personal injury in this state, to make special allegations as to the damages which will accrue from the diminution of the future earning capacity of the plaintiff, or the person injured, in order to let in evidence of such an element of damage, or in order to warrant the jury in giving damages under that head. The two Missouri cases cited by the supreme court in the *Mellor* case, in support of the proposition, are both cases for past damages." (p. 219.)[7]

[1] 116 Mo. 269.

[2] 115 Mo. 669.

[3] Gurley v. Mo. Pac. R. Co., 122 Mo. 141, 151.

[4] Gerdes v. Christopher Arch. Iron & Foundry Co., 124 Mo. 347, 360.

[5] 49 App. 214.

[6] 105 Mo. 455.

[7] The two cases referred to are O'Leary v. Rowan, 31 Mo. 117, and State to use v. Blackman, 51 Mo. 319.

§ 328. Where plaintiff made a contract with the defendant to come from Tennessee to Missouri to work on defendant's farm in the latter state, and there was a breach of the contract by defendant, plaintiff may recover for loss of time and the actual expenses incurred in coming to Missouri, though there is no specific allegation of such damages.[1]

§ 329. **In cases of permanent injury.**— That it is not necessary, in order to admit evidence that the injuries sustained were permanent, to allege that fact, is well settled.[2] And this rule has a special application where the action is for an injury to a minor.[3] Where the injury is permanent, and future pain reasonably certain, a general allegation of damages is sufficient to authorize recovery for future pain of body and mind.[4] Even if it were necessary to plead that the injuries were permanent, it is not necessary to do so in specific terms, provided that the petition when taken as a whole, and fairly construed, contains allegations covering such injuries with sufficient clearness.[5]

§ 330. **Stating the quantum of damages in personal-injury cases.**— As is stated above,[6] it is not necessary to allege the loss of a certain amount of earnings, nor that a certain amount was expended for medicines; it is sufficient to allege such loss and expenditure generally.[7] In fact, the measure of damages need never be set forth.[8]

§ 331. **Damages actual and exemplary.**— The statement of a conversion with the additional averment that it was done under such circumstances as afforded grounds for exemplary damages is not a statement of two causes of action.[9] In the absence of a statutory provision, it is not necessary to state separately the actual and exemplary damages sought to be recovered.[10] But in 1895 it was enacted that where exemplary or punitive damages are recoverable, the petition must state separately the amount of each kind of damages sought to be recovered, and the amount of each kind must be separately stated in the verdict.[11] Since the

[1] Moore v. Mountcastle, 72 Mo. 605.

[2] Lewis v. Independence, 54 App. 183; Golden v. Clinton, 54 App. 100; Gerdes v. Christopher Simpson Co., 124 Mo. 347.

[3] Bartley v. Trorlicht, 49 App. 214; Schmitz v. St. L., I. M. & S. R. Co., 119 Mo. 256.

[4] Gerdes v. Christopher Simpson Co., 124 Mo. 347.

[5] Lewis v. Independence, 54 App. 183.

[6] See § 327, p. 187.

[7] Cooney v. Southern El. R. Co., 80 App. 226.

[8] St. Louis Trust Co. v. Bambrick, 149 Mo. 560. See also § 319, *ante*.

[9] Peckham v. Lindell Glass Co., 9 App. 459.

[10] Lamberson v. Long, 66 App. 253; Hilbrant v. Donaldson, 69 App. 92.

[11] Rev. Stat. 1899, secs. 594, 595.

adoption of that act, punitive damages cannot be recovered unless the petition is drawn in conformity with the act; and if the petition contains no statement as to exemplary damages, evidence of the pecuniary circumstances of the defendant is not admissible.[1] The rule is that matters of aggravation do not constitute a part of the cause of action, and need not be specially pleaded.[2] If the facts alleged in the petition make out a case entitling plaintiff to exemplary damages, it is immaterial that the petition does not use the word "malice" in describing the offense charged.[3]

[1] Berryman v. Cox, 73 App. 67.
[2] Pierce v. Carpenter, 65 App. 191.
[3] Lyddon v. Dose, 81 App. 64.

## CHAPTER XV.

### THE RULES GOVERNING PETITIONS APPLIED TO VARIOUS ISSUES AND PROCEEDINGS.


§ 332. Pleading breach of duty.
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480. Action for waste.

§ **332. Pleading breach of duty.**— When a suit is for a breach of duty the facts out of which the duty arises must be set forth.[1]

§ **333. Pleading fraud.**— In an action based upon fraudulent representations there must be an averment of the *scienter*. And a pleading which avers no more than that the representations were untrue, without charging that they were knowingly untrue or fraudulently made, is bad.[2] If the action is one for deceit, and

[1] Field v. Chicago, R. I. & P. R. Co., 76 Mo. 614. [2] Fenwick v. Bowling, 50 App. 516.

the petition does not allege an intent to deceive, but contains only a general allegation of fraud, it fails to state a cause of action.[1] But if the petition alleges that the statement made by the defendant was false, and was fraudulently made, the *scienter* is sufficiently averred.[2] A petition alleged that defendant, intending to deceive and defraud plaintiff, falsely and fraudulently represented that the maker of a note was solvent, while in fact he was insolvent, and his insolvency was known to the defendant, and that the plaintiff, relying upon the truth of the representation, received the note and paid a valuable consideration for it. It was held that the petition stated a good cause of action.[3]

**§ 334. The charge of fraud must be specific.**— A general allegation of fraud is not sufficient: the facts constituting the fraud must be set out in detail;[4] nor is it sufficient that plaintiff alleges his belief in the existence of fraud: there must be a direct charge of fraud.[5] Thus, it is not sufficient to allege that plaintiff is informed and believes that a judgment debtor transferred his property to another for the purpose of defrauding and delaying his creditors; he must aver, charge such to be the fact.[6] Where the petition states that defendant, by means of family relations shown to exist, had the trust and confidence of his principal, and by reason of the existence of these circumstances had profited by acts which were hostile to his principal's interest and gained advantages by acts of treachery and bad faith towards his principal, of which the principal was wholly ignorant, it states a good cause of action.[7]

**§ 335. Pleading malice.**— Where malice is an essential ingredient of an action, it need not be charged in express terms if it is necessarily inferred from the facts stated in the petition.[8] The rule is that if the facts alleged in the petition make out a case of malice, it is not necessary to use the word "malice" in describing the offense, since the term imports, according to its legal signification, nothing more than that the act is wilful or intentional.[9] But if the petition contains a general charge of

[1] Redpath v. Lawrence, 42 App. 101.

[2] Arthur v. Wheeler & Wilson Mfg. Co., 12 App. 335.

[3] Jamison v. Copher, 35 Mo. 483.

[4] First Nat. Bank v. Rohrer, 138 Mo. 369; Goodson v. Goodson, 140 Mo. 206.

[5] Wilkinson v. Goodin, 71 App. 394; Nichols-Shepard Co. v. Hubert, 150 Mo. 620.

[6] Nichols-Shepard Co. v. Hubert, 150 Mo. 620.

[7] Williams v. Gerber, 75 App. 18.

This subject is, however, more fully discussed in chapter VII. See §§ 151–160.

[8] Sloan v. Speaker, 63 App. 321; Linville v. Rhoades, 73 App. 217.

[9] Lyddon v. Dose, 81 App. 64.

malice, and then goes on to state the specific facts constituting the malice, and such facts do not in law constitute malice, the petition is demurrable.[1]

**§ 336. Action by or against legal representative.**— In an action brought by an administrator to recover rent of the real estate of his intestate, which real estate had been leased by the administrator, it is not necessary that the petition should show that he was authorized by the proper court to lease the land.[2] If, in an action against an administrator, the petition sets forth facts from which it is apparent that any judgment rendered against defendant ought to be satisfied only out of the interest of the estate of the testator in the effects of a certain partnership, the petition must set forth the interest in the partnership, and must allege that upon a settlement of the administration of the partnership assets there is likely to be a surplus.[3]

**§ 337. Suit to recover debt.**— The petition in an action to recover a debt must contain an allegation that the debt sued for was due when the suit was begun.[4] So, where plaintiff brought an action against a guarantor to recover for goods sold to the person in whose behalf the guaranty was made, if the petition does not either directly or by necessary inference charge that the guaranteed debt was due when the action was commenced, it is fatally defective.[5]

**§ 338. Suit on lost instrument.**— An action may be maintained on any instrument of writing, notwithstanding it has been lost or destroyed; and it is sufficient for plaintiff to allege the loss or destruction as an excuse for not filing it.[6] This provision also applies to a defense on a lost instrument.[6] The allegation of the loss or destruction of the writing is not inconsistent with a recovery upon the writing.[7] It would seem that this section has no application to the case of a lost certificate of stock.[8] It does not apply where the contract was executed in duplicate, and only one of the copies has been destroyed.[9]

[1] Dritt v. Snodgrass, 66 Mo. 286. See also §§ 403, 404, *post*.

[2] Rector v. Ranken, 1 Mo. 371.

[3] Roberts v. Garesche, 8 App. 592. The requisites of a bill in equity against a legal representative to set aside his settlement or to charge him with waste will be found in § 483, *infra*.

[4] Wright v. Bankers' Mut. F. Ins. Co., 73 App. 365.

[5] Bauman Jewelry Co. v. Bertig, 81 App. 393.

[6] Rev. Stat. 1899, sec. 642.

[7] Bank of Commerce v. Hoeber, 8 App. 171, 176.

[8] Keller v. Eureka Brick Machine Co., 43 App. 84.

[9] Matthews v. Union Pac. R. Co., 66 App. 663. See also § 351, *post;* also ch. XVII.

§ **339. Account stated.**— As an account stated means in law that the parties have had an accounting together, have agreed upon a balance owing by one to the other, and that the one owing the balance has agreed to pay it to the other, a petition declaring on an account stated must allege these essential elements; otherwise it is fatally defective.[1] There must be at least an averment of defendant's assent to the settlement or to the balance stated.[2] And the petition must contain an allegation that defendant promised to pay the balance found to be due.[3] An allegation that plaintiff and defendant "have had accountings and settlements" is not an averment of an account stated.[4] The statement that the account was presented to defendant by plaintiff, and was after some months returned without objection, is a statement of merely evidential facts, which does not supply the place of the averment that both parties agreed to the account.[5]

§ **340. Accounting.**— In a proceeding for an accounting between partners the petition must either state or pray for an account.[6]

§ **341. Arbitration and award.**— Where there has been an arbitration, and the party in whose favor the award is made brings an action thereon, he need only set out so much of the award as shows his right to recover; if there is anything in the award constituting a defense, defendant must plead it.[7]

§ **342. Assault.**— A petition in an action for an assault and battery is sufficient if it charges that the assault and battery were unlawfully done in a rude, angry and insolent manner; and it is not necessary to separate the strikings and make each a separate cause of action.[8]

§ **343. Assumpsit.**— It seems to be the doctrine in Missouri that a petition in *assumpsit* for money had and received is not good if it omits to allege that defendant promised to pay the money to plaintiff.[9] Though the promise is implied by the law, yet it must be pleaded in the petition as a fact.[10] But the more recent decision of the court of appeals, that it is not necessary to expressly plead the promise, must, I think, be considered as

Davis v. Boswell, 77 App. 294.

[2] Van Blarcom v. Donovan, 16 App. 535.

[3] Bambrick v. Simms, 102 Mo. 158; Lustig v. Cohen, 44 App. 271.

[4] Ward v. Farrelly, 9 App. 370.

[5] Brown v. Kimmel, 67 Mo. 430, 432. See also McKeen v. Boatmen's Bank, 74 App. 281.

[6] Pope v. Salsman, 35 Mo. 362. See § 481, *post*.

[7] Finley v. Finley, 11 Mo. 624.

[8] Sloan v. Speaker, 63 App. 321.

[9] Gamage v. Bushell, 1 App. 416.

[10] Cape Girardeau & State Line R. Co. v. Kimmel, 58 Mo. 83.

more correctly stating the modern doctrine.[1] Under the common law in an action of *assumpsit* it was essential that the petition should contain an allegation that the defendant promised, because therein was the distinguishing feature of that form of action. It was a suit based upon a promise, and unless a promise was alleged the pleader was condemned as pursuing the wrong remedy. But as under the Code these particular forms of actions and legal fictions are abolished, the pleader is required only to state the facts. And the decisions in the code states are quite uniform that the promise need not be in terms alleged, if from the facts which are alleged a promise is implied. Especially is this so in view of the statutory provision that no allegation shall be made in a pleading which the law does not require to be proved.[2] The promise is an allegation of fact in *assumpsit* which is not required to be proved. In New York, where the Missouri Code originated, it is held that the promise need not be averred. Thus, the supreme court of that state says: "It is no longer necessary, and perhaps not even proper, for the plaintiff to allege in his complaint any promise on the part of the defendant, but he must state facts which, if true, according to well settled principles of law would have authorized him to allege, and the court to infer, a promise on the part of the defendant before the Code. The form of *assumpsit* is no longer necessary, or perhaps even proper, in such a case; but facts sufficient to raise it, and to put it on paper, were it lawful to do so, are still necessary."[3] And that view has also met the approbation of the court of appeals of New York. In *Farron v. Sherwood*[4] that court says: "It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise. That complies with the requirement that the facts must be stated constituting the cause of action." (p. 230.) I have noticed two decisions of the supreme court of Indiana in which the same position is taken,[5] and one by the supreme court of California.[6]

[1] First Nat. Bank v. Landis, 34 App. 433.

[2] Rev. Stat. 1899, sec. 610.

[3] Cropsey v. Sweeney, 27 Barb. 310, 312.

[4] 17 N. Y. 227.

[5] Gwaltney v. Cannon, 31 Ind. 227; Wills v. Wills, 34 Ind. 106. In the case last cited it is stated that, if the pleader omit any fact essential to justify the inference of a promise, the pleading will be bad.

[6] Wilkins v. Stidger, 22 Cal. 231. I cannot forbear giving here an illustration of the absurdity of alleging a promise in these cases, which illustration I take from the debates in the New York Constitutional Convention upon the question of adopting a Code of Civil Procedure, under which pro-

**§ 344. Assumpsit — Money had and received.**— It is permissible under the Code to frame a petition for money had and received in accordance with the common-law form.[1] In an action for money had and received the petition must show the source from which the money was received.[2] Where the action is for money had and received on a contract for the purchase of land, which the other contracting party is unable to convey, the petition must set out the nature and extent of such inability.[3]

**§ 345. Assumpsit — Use and occupation.**— In an action to recover for use and occupation of premises it was alleged that defendant used and occupied the premises for a certain period, thereby becoming the tenant of plaintiff, and indebted to him for the use and occupation in such sum as the premises were worth, stating that sum; and this petition was held to be sufficient.[4] It is not necessary to allege that any right to compensation was reserved by the plaintiff.[5]

vision of the constitution, then drafted, the New York Code was enacted. The speaker said: "For instance, if one were to rob another of his watch, the forms of proceeding at the common law would allow the person robbed to waive the force and to bring an action for the value of the watch, as upon a purchase. He could charge that on a certain day he sold and delivered to the defendant a certain watch, in consideration whereof he then promised to pay, when he should be thereto requested, as much as such watch was reasonably worth, and that it was reasonably worth $250. The defendant would answer *non assumpsit* — that he did not so promise. Every word in the declaration would be false, and the plea would be manifestly true. And yet there was no judge in the land who would not instruct the jury that, though this was a very outrageous act, the party whose watch it was had the right to waive the wrong, and to have twelve men say on their oaths that the defendant did promise to pay what the watch was reasonably worth, and that their verdict must be for the plaintiff." See Report of Code Commissioners, Pt. I, p. 70.

[1] Pipkin v. National Loan Association, 80 App. 1. Without citing any cases, which lack of space forbids, I may say that the courts of many of the code states support this position. A number of these cases will be found collected in Pomeroy on Remedies and Remedial Rights, sec. 542. I am, however, free to express the opinion that this constitutes a radical departure from the reform intended by the Code, and that the remarks of Valentine, J., in his dissenting opinion in Emslie v. Leavenworth, 20 Kan. 571, are eminently just. Notwithstanding the volume of precedent to the contrary, the time is coming when the courts in the code states must abandon all mere forms which have been inherited from the common law, however deeply they may be encrusted with the barnacles of age. And this is especially so where the common-law forms compel the pleader to allege an untruth. And the sooner that day comes, the better for the cause of justice. See also § 343, *ante*.

[2] Gamage v. Bushell, 1 App. 416.

[3] Phillipson v. Bates, 2 Mo. 116.

[4] Walker v. Mauro, 18 Mo. 564.

[5] Allen v. Wabash, St. Louis & Pac. R. Co., 84 Mo. 646.

A decision involving the question

**§ 346. In actions on bills and notes.**— A petition on a promissory note is sufficient if it sets out with appropriate averments the execution of the note by defendant and its non-payment at maturity.[1] It is proper to allege that the party made his note and thereby promised to pay, although on its face the note appears to have been executed by the defendant as agent for others.[2] So, if the note is signed "Steamboat Lee and owners, by W., Captain," the petition is sufficient if it avers that the defendants were bound, without stating the facts upon which the liability depended.[3] It is not necessary to allege by what name the party bound himself; it is sufficient to state the obligation generally, leaving the particular manner of it to the proof.[4]

§ 347. A petition is not good if it fails to allege that the note has matured and that the plaintiff is the owner or holder of it, or, if it is payable to bearer, that he is the bearer.[5] The petition need not state in terms that the note was delivered, if it describes the note and states that by it the defendant promised to pay.[6] A petition which alleges that A and B made their note to A, and that the note was delivered to plaintiff for a valuable consideration, whereby plaintiff became the owner of the note, without showing that the delivery was by an authorized person, is not good.[7]

§ 348. A petition on a promissory note substantially alleged that the defendant L. made his promissory note, by which he promised to pay to the order of plaintiff, etc., and that at the making of the said note the defendant B. indorsed the same on the back, and thereby became a maker of the said note with the said L. It was held that such petition contained sufficient facts to warrant a judgment, not only against L. but as well against B., though under the common-law action of *assumpsit* an express allegation that B. thereby promised to pay, etc., was required.[8]

**§ 349. Bills and notes — Stating the consideration.**— The statute provides that all instruments of writing made and signed by any person or his agent, whereby he shall promise to pay to

when an action of *quantum meruit* will lie will be found in § 375, *post.*

[1] Burdsal v. Davies, 58 Mo. 138.

[2] McMartin v. Adams, 16 Mo. 268.

[3] Sanders v. Anderson, 21 Mo. 402.

[4] See v. Cox, 16 Mo. 166.

[5] Spears v. Bond, 79 Mo. 467. See also Burdsal v. Davies, 58 Mo. 138. In actions to recover a debt there must always be an allegation that the debt is due. Wright v. Bankers' Ins. Co., 73 App. 365; Bauman Jewelry Co. v. Bertig, 81 App. 393.

[6] Meyer v. Fette, 31 Mo. 423; Fay v. Richmond, 18 App. 355.

[7] Mechanics' Bank v. Donnell, 35 Mo. 373.

[8] First Nat. Bank v. Landis, 34 App. 433. See § 343, *ante.*

any other or his order, or to bearer, any sum of money or property, shall import a consideration and be due and payable as specified in the instrument.[1] Whether the note is negotiable or non-negotiable, it is not necessary that the petition should set out the consideration, but if it is set out it must appear to be a good consideration.[2] Nor is it necessary to allege or prove a consideration for an indorsement.[3]

§ 350. **Bills and notes — Stating the date.**— The date of the note must be truly stated; and if it bears no date it may be alleged to have been made on any day; but in the latter case the words "bearing date" or "dated" must be omitted.[4] If an administrator brings an action on a note given to his intestate, which bears date subsequent to the granting of letters of administration, it is not necessary to aver that the note was incorrectly dated.[5]

§ 351. **Action on lost note.**— Where the action is to recover on a negotiable instrument which is alleged to have been lost, the petition need not contain an averment that plaintiff has executed a bond of indemnity as required by section 745,[6] although such bond must be given before judgment can be rendered in plaintiff's favor; but this may be done after the pleadings are filed and the issues joined, and therefore its mention in the petition is uncalled for.[7]

§ 352. **On note to partnership.**— Where the note is made payable to a firm, it is not necessary to allege in the petition that the note was executed to the payees by their firm name.[8]

§ 353. **Action against indorser.**—Where it is sought to hold the indorser on a negotiable promissory note, the petition must state the facts from which it will appear to the court that the note is in fact a negotiable one. It is not sufficient to aver that the note is negotiable.[9] And a mere allegation that the note was executed for a valuable consideration is not sufficient to indicate whether it is negotiable or non-negotiable, since notes of both classes are generally given for a valuable consideration. The petition must in terms aver that the note was expressed to be for

[1] Rev. Stat. 1899, sec. 894.

[2] Glasscock v. Glasscock, 66 Mo. 627; Taylor v. Newman, 77 Mo. 257.

[3] Rubelman v. McNichol, 13 App. 584. That the petition must show that the note was expressed to be for value received, see § 353, *post.*

[4] Grant v. Winn, 7 Mo. 188.

[5] Hamilton v. Stewart, 5 Mo. 266.

[6] Rev. Stat. 1899.

[7] Eans v. Exchange Bank, 79 Mo. 182. See also § 338, *ante.*

[8] Lee v. Hunt, 6 Mo. 163. Consult also § 249, *ante.*

[9] Townsend v. Heer Dry Goods Co., 85 Mo. 503.

value received.[1] But if the recital is accompanied by a copy of the note, which is set out *in hæc verba* in the petition, and such copy contains the words "value received," the petition is good.[2] Where the action is brought by an indorsee, the petition must show his title or ownership, and an omission to do so is fatal, even on motion in arrest or on appeal.[3] But it is not necessary that he should aver that he is a holder for value.[4] An allegation that, before maturity, the note was indorsed and transferred to plaintiff for a valuable consideration, and that he was the holder and owner at maturity, is a sufficient allegation of title in plaintiff.[5] An allegation that the payee of the note indorsed it to the plaintiff by writing his name on the back of it is a sufficient averment of ownership.[6] It is not necessary to set out all the successive indorsements.[7] But if there is an attempt to set them out, they must be so alleged as to show a title in plaintiff.[8]

§ 354. Where the action is against the maker and one or more of the indorsers, it is sufficient to aver the execution of the note and the non-payment of it by the defendants. The fact that the action is against several parties who are severally liable does not change the character of the pleading as against each, nor make it necessary to aver more, to make each of the defendants liable, than would have been required if each had been sued separately.[9]

**§ 355. Alleging acceptance.**— In an action by the indorsee against an indorser of a bill of exchange, a petition which alleges that the bill was presented to the drawee for acceptance, "and was by him then and there declined and refused acceptance, and not accepted," contains a sufficient averment of a demand of acceptance.[10] Where a bill of exchange was payable on demand, and the petition alleged a conditional acceptance, the effect of which was to postpone payment, but failed to allege that the drawer had timely notice of the nature of the acceptance, and had consented to it, or that the drawee had not kept the terms of his acceptance, and also failed to contain averments showing

[1] Hart v. Harrison Wire Co., 91 Mo. 414.

[2] Jacobs v. Gibson, 77 App. 244; Harkness v. Jones, 71 App. 289.

[3] Donovan v. Thompson Pottery Co., 9 App. 595.

[4] Clark v. Schneider, 17 Mo. 295; Rubelman v. McNichol, 13 App. 584.

[5] Hawes v. Mulholland, 78 App. 493.

[6] Rubelman v. McNichol, 13 App. 584.

[7] Kinealy v. Burd, 9 App. 359.

[8] Dyer v. Krayer, 37 Mo. 603.

[9] Page v. Snow, 18 Mo. 126. For a case where one writing his name on the back is sued as maker, see § 348, *ante*.

[10] First Nat. Bank v. Hatch, 78 Mo. 13.

that, as between the drawer and the drawee, the former had no right to draw the bill, such petition is bad for want of some one of these averments.[1]

§ 356. **Demand and notice.**— In an action against the maker and indorsers of a note, an allegation that on the day it became due it was duly presented to the maker, and that payment was refused, is a sufficient averment of a demand and refusal.[2] And the statement of a demand is sufficient without the accompanying statement that presentment was made.[3] If the action is on a note payable at a particular place, the petition is fatally defective if it fails to aver presentment at that place, a demand of payment there, and notice of non-payment to the indorser.[4]

§ 357. An allegation that the indorser had notice of demand and protest is sufficient to let in proof of due notice of demand and refusal.[5] Any facts which dispense with the necessity of making a demand and of giving notice must be specifically set out.[6] An averment that at defendant's instance and request the note was not protested, he waiving protest, is not a sufficient averment of a demand, or of facts which will excuse or be equivalent to a demand.[7] Where the indorser has guaranteed payment at maturity and waived notice of protest and demand, the petition is sufficient if such indorsement is fully set out, without alleging that a demand was made and that notice was given, since the words of waiver are broad enough to include all the steps legally necessary to fix the liability of the indorser.[8]

§ 358. A draft issued by one bank upon another is equivalent to a bill of exchange, and the same rules prevail as to presentment and notice. Therefore, where the holder of such a draft sues the bank issuing it, the petition must contain an allegation that the draft had been presented to the bank on which it was drawn and payment refused.[9]

§ 359. **Action on assigned note.**— Where the action is against an assignor of a non-negotiable note, the petition must aver the existence of such facts as will, under the statute, render the assignor liable.[10] Thus it must show that the holder has used due

[1] Taylor v. Newman, 77 Mo. 257.

[2] Ewing v. Pulitzer, 12 App. 578; Rude v. Harvey, 83 Mo. 188.

[3] Mercantile Bank v. McCarthy, 7 App. 318.

[4] Faulkner v. Faulkner, 73 Mo. 327.

[5] Mechanics' Savings Institution v. Finn, 1 App. 36.

[6] Pier v. Heinrichoffen, 52 Mo. 333.

[7] Jaccard v. Anderson, 32 Mo. 188.

[8] Hammett v. Trueworthy, 51 App. 281. But see *ante*, § 145 *et seq.*

[9] Myers v. Commercial Bank, 72 App. 4.

[10] Weimer v. Shelton, 7 Mo. 266.

diligence in the employment of proper means to collect the note from the maker, since the question of diligence is the one of law to be determined by the court;[1] or it must aver existence of some fact which, under the statute, renders the assignor liable.[2]

§ 360. **Action on bond.**— A petition is good which sets out the bond, omitting only the signature and seal.[3] Thus, a petition which stated that defendants, by their certain writing obligatory, sealed with their seals, became bound unto A in the sum of —— dollars, for the just payment of which they bound themselves, sufficiently avers the execution of the bond by defendants.[4] The condition of the bond must be set forth, if not *in hæc verba*, at least in substance.[5] The breaches of the bond must of course be assigned in clear and concise language.[6] Where the condition of a bond was that the obligor should use his endeavors to sell certain lands before a certain day, and the petition alleged that plaintiff did not know and could not say whether defendant did use his endeavors, but that the obligor did not sell the property within the time specified, the breach was not sufficiently assigned; there should have been an averment that the obligor did not use his endeavors.[7] The several breaches of the bond do not constitute different causes of action.[8] Even though the plaintiff sets out the breaches in the form of several counts, the petition nevertheless states but a single cause of action on the bond.[9]

§ 361. The averment in a petition was as follows: "Whereby defendants became liable to pay plaintiff to the use of said relator the sum of $2,000; wherefore plaintiff prays judgment against defendants in the sum of $2,000, the penalty of said bond, and that execution issue against defendants for the sum of $177."[10] This was held to be a sufficient averment of the penalty of the bond.[11]

§ 362. **Bonds other than for the payment of money.**— In an action on a bond for the breach of any condition other than the

[1] Collins v. Warburton, 3 Mo. 202.

[2] Weimer v. Shelton, 7 Mo. 266.

[3] Busche v. McElroy, 12 App. 567.

[4] State ex rel. v. Rush, 77 Mo. 586.

[5] Payne v. Snell, 4 Mo. 238; State ex rel. v. Pace, 34 App. 458.

[6] State to use v. Thomas, 17 Mo. 503; Schuyler v. Chittenden, 47 Mo. 65; State to use v. Bartlett, 68 Mo. 581; State ex rel. v. Pace, 34 App. 458.

[7] Schuyler v. Chittenden, 47 Mo. 65.

[8] State to use v. Davis, 35 Mo. 406; State to use v. Bonner, 5 App. 13; State to use v. Webster, 53 Mo. 135.

[9] Hickory County v. Fugate, 143 Mo. 71.

[10] See Rev. Stat. 1899, sec. 471.

[11] State ex rel. v. Johnson, 78 App. 569.

payment of money, or for a penal sum for the non-performance of any covenant or written agreement, the petition must set out the specific breaches for which the action is brought.[1] A bond given under sections 4343, 4344,[2] giving to mortgagees a year after the sale for redemption, and which is conditioned to be void upon payment of the interest to accrue on the secured debt, is a bond for the payment of money, and is excepted by section 468[1] from the rule of pleading relative to the assignment of specific breaches.[3]

§ 363. **Bond executed in assumed name.**— If one had executed a bond in an assumed name, he could not under the common law have sued by his true name, though the declaration contained an averment that he made the bond in an assumed name; but the rule is otherwise under the Code.[4]

§ 364. **Action on attachment bond.**— In an action on an attachment bond it is not necessary to aver that there was an affidavit for the attachment made and filed, if the petition contains an averment that a plea in abatement was filed in such attachment suit, and that upon the issues tendered by it a trial and judgment were had.[5] The truth or falsity of the attachment affidavit cannot, however, be tried in an action on the attachment bond, and an averment in the petition that certain statements in the attachment affidavit were false should be stricken out.[6] The breach assigned in an action on an attachment bond was that the plea in abatement was found against the attaching creditor; and it was then alleged that plaintiff was compelled to and did lay out and expend large sums of money, and was put to great expense and trouble in and about defendant's said action, to wit, $500. It was held that these allegations would authorize the introduction of evidence as to special damages, such as lawyer's fees, hotel bills, etc.[7]

§ 365. **Actions against carriers.**— It is not necessary to state what the carrier's duty is; it is sufficient to set forth that defend-

[1] Rev. Stat. 1899, sec. 468.

[2] Rev. Stat. 1899.

[3] Mutual Benefit Ins. Co. v. Brown, 80 App. 459. In Bank of Hale v. Pennington, 62 App. 585, the action was on a bond for the redemption of certain land, which bond was given pursuant to a decree in equity, and the petition set out in full is approved by the court.

[4] Sanders v. Anderson, 21 Mo. 402.

[5] State ex rel. v. Pace, 34 App. 458.

[6] Bennett v. Southern Bank, 61 App. 297.

[7] Kelly v. Beauchamp, 59 Mo. 178; and a decision of the court of appeals is to a like effect. State to use v. McHale, 16 App. 478.

I have put actions on *official bonds* in §§ 441–444, *post;* actions on *public securities* in § 451, *post.*

ant is a common carrier, the delivery of the goods to it and their loss through negligence. If the carrier has a special contract he must set it up.[1] A petition which charges in substance that defendant did not exercise due and proper care in the carriage of plaintiff's hogs, but that on the contrary its officers, servants and agents carelessly, improperly and negligently managed and conducted defendant's steamboat, by reason of which carelessness, negligence and improper conduct said hogs were destroyed by fire, and wholly lost to plaintiff, is sufficient.[2] If the action against the carrier is *ex contractu*, and there is a special contract by which the common-law liability is restricted, such special contract must be set out in the petition; but if the action is in tort for the breach of the duty imposed by law, it is unnecessary to notice the special contract, even though it is under seal.[3] But in the latter case the defendant may set up the special contract and found a defense upon it.[4] It is not necessary to aver a consideration for the contract.[5]

**§ 366. Same — Averment that defendant is a common carrier.**— It is not necessary that the petition should expressly state that defendant is a common carrier for hire. It is sufficient if it clearly appears from all the allegations of the petition taken together that defendant was a common carrier, or that the contract of affreightment was entered into with defendant in that capacity.[6] Thus the allegation of a contract to carry, coupled with an averment that defendant is a railroad corporation, is sufficient to fix the liability of defendant as a common carrier.[7]

**§ 367. Same — Alleging negligence.**— In an action based upon the common-law liability of a carrier for failing to carry an animal safely, the petition need only allege general negligence; but if plaintiff specifies the acts of negligence, he will be confined in his proof to those acts.[8] Where the cause of action is based upon negligence on the part of the agents of defendant in increasing the speed of a moving car while a passenger was

[1] Clark v. St. Louis, K. C. & N. R. Co., 64 Mo. 440; McFadden v. Missouri Pac. R. Co., 92 Mo. 343.

[2] Carlisle v. Keokuk Northern Line Packet Co., 82 Mo. 40.

[3] Clark v. St. Louis, K. C. & N. R. Co., 64 Mo. 440; Garrison v. Baggage Trans. Co., 94 Mo. 130.

[4] Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo. 629; Goodman v. Missouri, K. & T. R. Co., 71 Mo. 460.

[5] Davis v. Jacksonville Southeastern Line, 126 Mo. 69.

[6] Smithers v. Steamboat War Eagle, 29 Mo. 312.

[7] Kain v. Kansas City, St. J. & C. B. R. Co., 29 App. 53.

[8] Lachner v. Adams Express Co., 72 App. 13.

in the act of stepping aboard, it is essential that the petition should allege the knowledge of defendant's agents, or the opportunity by ordinary care of knowing, that plaintiff was in the act of boarding the car.[1]

§ 368. **Same — Action by passenger.**— Where an action is brought by a passenger, it is proper to set out in the petition the contract with the defendant's agent in the purchase of the ticket, such fact being declared on as a matter of inducement and as the foundation of plaintiff's asserted right to be on the defendant's train, from which, as a matter of law, springs the obligation of the defendant carrier, these allegations being followed with averments of a breach of the contract by defendant's failure to perform its duty in this respect.[2] If, however, the injury occurred while plaintiff was a passenger on a freight train, it is not necessary that the petition should set out the rules of the company relating to riding upon freight trains, and allege a compliance with such rules on his part; if there was a known violation by the plaintiff of the company's rules, this is matter of defense, which must be set up by the defendant.[3] A petition which states that plaintiff, while a passenger on a moving train, was directed by the conductor, or some other employee of defendant, to jump off on reaching his stopping place, and by reason of obeying such direction plaintiff was injured, is not fatally defective because it does not state that the "other employee" was authorized by defendant to give such directions to passengers.[4] Where the action was based upon the wrongful ejection of plaintiff from the train at a station other than the one to which plaintiff had purchased a ticket, and the petition shows that the train did not stop at that station, the petition is defective if it fails to allege that under the rules of the company the train on which plaintiff took passage was required to stop at such station.[5]

§ 369. **Action on contract.**— A petition to recover for a breach of contract should set out the contract, either in full or in substance, and then assign the breaches.[6] But it is only necessary to set out so much of the contract as relates to the point of

[1] Worthington v. Lindell R. Co., 72 App. 162.

[2] McGinnis v. Mo. Pac. R. Co., 21 App. 399.

[3] Whitehead v. St. Louis, I. M. & S. R. Co., 99 Mo. 263. This decision of the supreme court necessarily overrules the earlier decision of the court of appeals in the same case. 22 App. 60.

[4] Wilburn v. St. Louis, I. M. & S. R. Co., 36 App. 203.

[5] Turner v. McCook, 77 App. 196. See also § 367, *ante*.

[6] Langford v. Sanger, 40 Mo. 160.

which complaint is made.[1] Yet the omission of any part of the contract which materially qualifies and alters the legal nature of the promise which is alleged to have been broken will be fatal.[1] A mere incident to the undertaking need not be stated.[2] The petition must state with whom the defendant agreed and to whom he became responsible;[3] and it must allege and prove a substantial compliance on plaintiff's part with the contract.[4] Where the action is against two persons the petition need not state that the liability was jointly incurred by them.[5]

§ 370. Where a contract is referred to in the petition only as matter of inducement, as, for example, to explain the nature of a slanderous charge made by defendant against plaintiff, it need not be set out with any great particularity.[6] But if the petition states a contract by way of inducement, and then declares upon a subsequent agreement based upon a condition which it does not allege has been performed, it states no cause of action.[7]

§ 371. If the contract relied on by plaintiff is express, it must be so pleaded, and the terms of the contract must be substantially set out. But if the contract is implied, the facts out of which it is claimed to arise should be pleaded, and it is then proper that the plaintiff, after stating the facts, should draw the conclusion that the contract was implied from them.[8]

§ 372. Where the contract is one concerning land, the petition is not defective because it does not state that such contract is in writing; if defendant relies upon the statute of frauds he must plead it.[9] And in such case, where the petition does not disclose whether the contract is in writing or parol, it will be presumed that the contract alleged is in writing,[10] and that the contract is a valid one.[11]

**§ 373. Contracts — Stating the consideration.**— The general rule is that in actions on simple contracts the consideration should be expressly and formally pleaded; but the rule does not include contracts under seal and negotiable instruments, for they import a consideration.[12] Nor does the rule include instruments in

[1] Moore v. Mountcastle, 72 Mo. 605.
[2] Owens v. Geiger, 2 Mo. 39.
[3] Tate v. Barcroft, 1 Mo. 163; Laberge v. McCausland, 3 Mo. 585; Keatly v. McLaugherty, 4 Mo. 221.
[4] Fairbanks v. De Lissa, 36 App. 711.
[5] Fellows v. Jernigan, 68 Mo. 434.
[6] Clements v. Maloney, 55 Mo. 352.
[7] Brecheisen v. Coffey, 15 App. 80.
[8] Wetmore v. Crouch, 150 Mo. 671.
[9] Gist v. Eubank, 29 Mo. 248.
[10] Sharkey v. McDermott, 91 Mo. 467.
[11] Van Idour v. Nelson, 60 App. 523.
[12] Montgomery County v. Auchley, 92 Mo. 126. It is doubtful whether the above exception as to sealed instruments would now apply in view of the terms of section 983 (Rev. Stat. 1899), abolishing private seals.

writing which are declared by section 894[1] to import a consideration;[2] as a bill of exchange or promissory note.[3] If the instrument sued on imports a consideration, and defendant relies on a want of consideration, he must plead it.[4] While it is true that in an action based upon a written promise to pay money it is not necessary that the petition should state a consideration, yet if it does state one it must be a good one, or the petition will be demurrable.[5] In an action against a common carrier upon a contract for the carriage of goods, it is not necessary to allege a consideration.[6]

§ 374. **Where the contract has been modified.**— If the terms of the contract have been changed or modified by a subsequent agreement, plaintiff must declare on the agreement as modified, and the change in the contract must be clearly set forth.[7] If the contract was in writing, but the modification by parol, plaintiff should declare on it by first setting out the agreement and then the modification, since each is a substantive fact.[8] Where the contract was for the payment of a debt, and there has been a subsequent agreement which merely amounts to an extension of time for such payment, it need not be alleged in the petition.[9]

§ 375. **Contracts — Quantum meruit.**— Where the plaintiff has been prevented by the other party from completing his work, and, waiving the damages for breach of the contract, sues to recover on *quantum meruit*, it is no objection to the petition that it sets out the contract and avers a compliance by plaintiff with its terms, and the termination of the contract by defendant, provided the petition shows that plaintiff elected to treat the contract as canceled, and is seeking to recover only the value of the services rendered.[10]

[1] Rev. Stat. 1899.

[2] Caples v. Branham, 20 Mo. 244; Montgomery County v. Auchley, 92 Mo. 126.

[3] Taylor v. Newman, 77 Mo. 257; Rubelman v. McNichol, 13 App. 584.

[4] Montgomery County v. Auchley, 92 Mo. 126. This case further holds that the statute also applies to a large class of contracts in writing which do not come under the designation of negotiable or non-negotiable notes or bills.

[5] Glasscock v. Glasscock, 66 Mo. 627.

[6] Davis v. Jacksonville Southeastern Line, 126 Mo. 69.

[7] Henning v. United States Ins. Co., 47 Mo. 425; Lanitz v. King, 93 Mo. 513.

[8] Harrison v. Kansas City, C. & S. R. Co., 50 App. 332; Halpin Mfg. Co. v. School District, 54 App. 371 (in which case the prior cases are reviewed and distinguished); Evers v. Shumaker, 57 App. 454.

[9] Maack v. Schneider, 51 App. 92.

[10] Ehrlich v. Ætna Life Ins. Co., 88 Mo. 249.

**§ 376. Contracts — Illustrations.**— Where the cause of action is based upon an agreement by defendant to pay out of the proceeds of the sale of certain property a debt which plaintiff owes a third party, plaintiff must, in his petition, allege that there has been a sale of the property or a conversion of it by defendant, since defendant's contract, not being to pay generally, but to pay out of the special fund, it is to this fund only that the plaintiff can look for payment.[1] In an action to recover damages for breach of a contract for the sale of real estate, the petition must allege a tender of a deed or some excuse for not doing so.[2] But where the contract was to exchange land, in suing for a breach plaintiff need not aver the tender of a deed on his part, if defendant, by conveying his land to a third party, has put it out of his power to perform his part of the contract.[3] Where one covenants to convey land upon the performance of a particular act, such as the payment of money, it is not necessary, in an action to recover damages for breach of such agreement, to allege a demand for a deed.[4] But if the contract were made with one who is deceased, it must be alleged that a demand was made for a deed by the party entitled to the deed, whether heir or devisee.[5]

**§ 377. In actions for conversion.**—The old technical rules of pleading have no application to an action under the Code to recover for a conversion.[6] If the cause of action is a conversion of plaintiff's property to defendant's use, that fact should be directly alleged; it is not sufficient to state facts which constitute evidence of the conversion.[7] But it seems it is sufficient to allege facts from which a conversion may be inferred.[8] The petition is good if it alleges a wrongful or tortious taking of plaintiff's property.[9] Yet, while the use of the formal and technical averments, which were necessary at common law to the statement of a cause of action in trover, have been dispensed with by our code, all the allegations which were material under the common law are still necessary under the Code. In a common-law

[1] New York Store Mer. Co. v. Chapman, 78 App. 616.

[2] Black v. Crowther, 74 App. 480.

[3] Way v. Miller, 80 App. 382.

[4] Pye v. Rutter, 7 Mo. 548.

[5] Laberge v. McCausland, 3 Mo. 585. The rules governing actions for a breach of promise of marriage will be found in § 406, *post*.

[6] Knipper v. Blumenthal, 107 Mo. 665.

[7] Perry v. Musser, 68 Mo. 477.

[8] Withers v. Lafayette County Bank, 67 App. 115, 119.

[9] Norman v. Horn, 36 App. 419. See notes 1–3 on next page.

action of trover it was necessary to state that plaintiff had the possession, or the right to possession, of the property sued for at the time of the conversion; and such averment is equally necessary under the Code.[1] An allegation that plaintiff on August 25, 1893, became and ever since has been and now is the owner of the property in controversy, and that afterwards said property came into the possession of the defendant, who unlawfully converted the same to his own use and disposed of the same, contains no averment of possession or to the right of possession in plaintiff, and therefore fails to state a cause of action.[2] In an action for cutting down trees and carrying them away, if there is an averment that the land on which the trees grew belonged to plaintiff, it is not necessary to allege that the trees were plaintiff's property.[3] If a conversion is in terms alleged, it is not necessary to allege a demand and refusal, even though defendant may have lawfully come into possession of the converted property.[4]

§ 378. In an action for improperly canceling stock certificates, a petition alleging that the certificates were fraudulently and without authority canceled, and that the corporation refused to issue others in lieu of them, states a cause of action, since it states facts sufficient to constitute a conversion of the stock, or at least facts from which a conversion may be inferred.[5]

**§ 379. Action by or against corporation.**— In an action by a corporation, an allegation that the plaintiff is a corporation duly incorporated under and by virtue of a certain act is sufficient.[6] In suing on a note, executed to a corporation by its corporate name, it is not necessary to allege that plaintiff is a corporation.[7] In pleading the dissolution of a corporation it is necessary

[1] Citizens' Bank v. Tiger Tail Mill & Land Co., 152 Mo. 145.

[2] Ibid. This decision of the supreme court seemingly destroys the authority of Warnick v. Baker, 42 App. 439, decided by the court of appeals, wherein it is held that if the petition alleges that defendant, without leave, forcibly and wrongfully drove away certain cattle belonging to plaintiff, and had not returned them, it is sufficient, the allegation "belonging to plaintiff" being an allegation of title which carries with it the possession. It is to be observed, however, that the decisions of the appellate courts were in each case in support of the verdict or finding.

[3] Atlantic & Pacific R. Co. v. Freeman, 61 Mo. 80. But compare the later decision cited in note 1.

[4] Battel v. Crawford, 59 Mo. 215.

[5] Withers v. Lafayette County Bank, 67 App. 115.

[6] Chillicothe Savings Ass'n v. Ruegger, 60 Mo. 218.

[7] Farmers' & Merchants' Ins. Co. v. Needles, 52 Mo. 17.

only to allege that the company was dissolved, and it is unnecessary to state the facts upon which that allegation is based[1] In an action for improperly canceling stock certificates, a petition alleging that the certificates were fraudulently and without authority canceled, and that the corporation refused to issue others in lieu thereof, states a cause of action, since it states facts sufficient to constitute a conversion of the stock, or at least facts from which a conversion may be inferred.[2]

§ 380. **Action for breach of covenant.**— In an action for breach of a covenant of seizin, the breach is well assigned by negativing the words of the covenant.[3] If the averments of the petition, either in their express intent or by necessary implication, show that a breach has been committed, it is sufficient.[4] But the petition must set out the particular incumbrances relied on as constituting the breach.[5] If the petition sets up an outstanding title which plaintiff was compelled to purchase, it need not name the person who held the adverse title.[6]

§ 381. **For breach of warranty in sale.**— Where an action is brought upon a breach of warranty of soundness in the sale of a horse, a general allegation that the horse was unsound, without specification, is sufficient; and it is unnecessary to negative the idea that the defects were apparent.[7] But if the plaintiff is not content with the general allegation that the horse is unsound, and proceeds to state the cause of its unsoundness and the nature of the disease with which it is afflicted, he must prove such specific allegation.[8]

§ 382. **Actions under the damage act.**— The rules governing petitions brought under the damage act[9] will be found *post*, in sections 421 *et seq.*

§ 383. **In suits for divorce.**— A petition for a divorce must show the facts which under the statute confer jurisdiction over the cause.[10] The grounds upon which the divorce is claimed must

[1] Perry v. Turner, 55 Mo. 418.

[2] Withers v. Lafayette County Bank, 67 App. 115.

A decision as to the requisites of a bill in equity, filed by judgment creditors against the shareholders in a corporation, will be found in § 482, *post*.

The principles applicable to petitions by or against municipal corporations, and the rules for pleading the incorporation of a municipality, will be found *post*, §§ 417–420.

[3] Evans v. Fulton, 134 Mo. 653.

[4] Stone v. Wendover, 2 App. 247.

[5] Shelton v. Pease, 10 Mo. 473.

[6] Hall v. Bray, 51 Mo. 288.

[7] Labeaume v. Poctlington, 21 Mo. 35.

[8] Lindsay v. Davis, 30 Mo. 406.

[9] Rev. Stat. 1899, secs. 2864–2866.

[10] Cheatham v. Cheatham, 10 Mo. 296.

be specifically alleged, and should not be left to inference or presumption. A mere charge of abandonment is not sufficient; the words of the statute should be followed;[1] and the petition must allege that the absence is without reasonable cause and against the will of the petitioner.[2] If the ground upon which the divorce is claimed is indignities offered, it is not sufficient to charge this in general terms; the specific acts constituting the indignities must be set forth.[3] The petition must also allege good conduct on the part of the complainant.[4] Different grounds for divorce may be joined in the same petition.[1]

§ 384. **Petition for admeasurement of dower.**— Section 2933 gives dower to the widow only in lands of which her husband was during the marriage seized of an estate of inheritance. Therefore a petition for the admeasurement of dower must allege that the husband was seized of an estate of inheritance during the coverture, otherwise it is fatally defective.[5]

§ 385. **Action against dram-shop keeper.**— Where a parent brings an action against the keeper of a dram-shop for selling intoxicating liquor to his minor child without the parent's consent, it is not necessary that the petition should set forth the kind of liquor which was sold.[6]

§ 386. **In actions of ejectment.**— In an action of ejectment it is sufficient for plaintiff to aver that on some day, to be specified in the petition, he was entitled to the possession of the premises, describing them, and, being so entitled to the possession thereof, that defendant afterward, on some day to be stated in the petition, entered into such premises and unlawfully withholds from plaintiff the possession of them, to his damage in such sum as he may claim.[7] It is said in *Alexander v. Campbell*[8] that this section does not require that the petition shall state the facts specified, but it says it shall be sufficient if it does so. (p. 145.) The only substantive facts required by the statute to be alleged are that at the commencement of the action defendant was in possession of the property sought to be recovered, and that plaintiff at that time was legally entitled to its possession.[9] It is not sufficient to allege that plaintiff is legally entitled to the premises; the allegation must be that he is legally entitled to the

[1] Stokes v. Stokes, 1 Mo. 320.
[2] Freeland v. Freeland, 19 Mo. 354; Hoffman v. Hoffman, 43 Mo. 547.
[3] Bowers v. Bowers, 19 Mo. 351.
[4] Yallaly v. Yallaly, 39 Mo. 490.
[5] Garrison v. Young, 135 Mo. 203.
[6] Edwards v. Brown, 67 Mo. 377.
[7] Rev. Stat. 1899, sec. 3058.
[8] 74 Mo. 142.
[9] Alexander v. Campbell, 74 Mo. 142.

possession of the premises.[1] An allegation of seizin in the ancestor and descent to the heirs is, however, a sufficient allegation of title and right to possession.[2] If the petition fails to allege either ouster of plaintiff or possession by defendant it is defective.[3] But it would seem that, unless the action is between cotenants, it is not necessary for plaintiff to allege an entry or an ouster by the defendant.[4] Where defendants in ejectment are husband and wife, and the action is to recover premises which tenants have held over after the expiration of the lease, it is not necessary that the petition should allege that the holding over was the separate act of the wife, though the dispossession complained of was in fact her sole act.[5]

§ 387. **Ejectment — Description.**— The petition must contain such a description of the premises in controversy as to enable the jury to identify them with those described in the deeds upon which the plaintiff bases his claim.[6] And the description must be such that, in the event of a recovery by plaintiff, the officer charged with the execution of the writ of possession, describing it in the same terms as those contained in the petition, will know from the writ alone of what land it is his duty to put plaintiff in possession.[7] And even though the deed under which the plaintiff claims title is defective in the description, the petition must yet contain an adequate description, and he must, upon the trial, supply the defect by parol evidence.[7] If the petition fails to correctly describe the lands sued for, there can be no valid judgment.[8]

§ 388. **Actions against judges of election.**— Where one brings an action against judges of election for wrongfully refusing to receive his vote, his petition must contain a specific statement of all the facts which gave him the right to vote.[9]

§ 389. **Proceeding to enforce an escheat.**— Where a proceeding is instituted by the state to recover land which is claimed to have escheated to the state by reason of having belonged to a deceased alien, the petition must expressly negative the existence of those facts which under the statute entitled an alien or his heirs to hold the land. Thus, where the statute provided that

[1] Jamison v. Smith, 4 Mo. 202.
[2] Tuppery v. Hertung, 46 Mo. 135.
[3] Tetherow v. Chambers, 74 Mo. 183.
[4] Alexander v. Campbell, 74 Mo. 142.
[5] Van Schrader v. Taylor, 7 App. 361.
[6] Newman v. Lawless, 6 Mo. 279; Lemmon v. Hartsook, 80 Mo. 13.
[7] Livingston County v. Morris, 71 Mo. 603.
[8] Bricken v. Cross, 140 Mo. 166.
[9] Curry v. Cabliss, 37 Mo. 330.

an alien might own real estate if he had at the time of receiving his conveyance declared his intention to become a citizen of the United States, the petition must state that he had not made such declaration. And if the statute provided that an alien might devise the land, the petition must aver that he had not made such devise.[1]

§ 390. **Action on a guaranty.**— It is not necessary to allege that the guaranty is in writing.[2] And a general averment of a notice of acceptance of the guaranty by the plaintiff is sufficient.[3]

§ 391. **Action between husband and wife.**— A married woman brought suit against her husband for the possession of her lands. The petition stated that plaintiff was the owner of the real estate in question, that it was her sole and separate property, that her husband struck her and beat her with his fists, and was guilty of such cruel and inhuman treatment as to endanger her life and to justify her living separate and apart from him, that he had exclusive possession of the lands, and prevented her from enjoying any part of the rents and profits thereof. Such a petition states a good cause of action under the statute,[4] and is also a good bill in equity independent of the statute, if the land in question constitutes the wife's equitable separate estate.[5]

§ 392. **Actions on policies of insurance.**— If in an action on a policy of insurance the petition fails to allege, either directly or inferentially, the amount of the insurance, or that plaintiff was insured in any specific amount, or that he was to be reimbursed in money or other things, it is fatally defective.[6] And a petition in an action to recover for the loss of goods under a policy insuring a stock of goods in a certain store must contain an averment that the goods were at the time of the loss in such store.[7] So, too, the petition is defective if it fails to state that the insurance was for a definite period, and that at the date of the loss such period had not expired.[8] If the petition fails to allege that the policy was due and payable at the institution of

[1] State v. Killian, 51 Mo. 80.

The requisites of a petition in an action against an officer for failure to apprise a debtor of his exemption rights will be found *post*, § 442. For petition by a real-estate agent to recover commissions, see *post*, § 449.

[2] Miles v. Jones, 28 Mo. 87.

[3] Central Savings Bank v. Shine, 48 Mo. 456.

[4] Rev. Stat. 1899, sec. 4336.

[5] Sackman v. Sackman, 143 Mo. 576.

[6] Wittkowsky v. American Ins. Co., 79 App. 501.

[7] Wright v. Bankers' Ins. Co., 73 App. 365.

[8] Shaver v. Mercantile Ins. Co., 79 App. 420.

the suit, and contains no allegation from which such fact may be reasonably inferred, it is bad even after verdict.[1] A mere allegation of defendant's indebtedness to plaintiff is insufficient.[2] An allegation that defendant insured plaintiff against loss or damage by fire to the amount of $525 is equivalent to an allegation of a promise by defendant to pay plaintiff such amount at the happening of the loss.[3]

§ 393. Where there is an oral contract for insurance, the law implies that the insurance is to be on such terms and conditions as are ordinarily contained in the policies issued on such property. It is not necessary, however, for plaintiff to set out these terms and conditions which the law thus holds to be implied, and allege their performance. If defendant relies upon the non-performance of any of such conditions, it must set them up as a substantive defense in its answer.[4] If the petition alleges that plaintiff duly fulfilled all the conditions of the policy sued on, there is no necessity to specifically aver notice and proof of loss.[5] If interest is not prayed for in the petition, no interest can be recovered.[6]

**§ 394. Insurance — Allegation of ownership.**— A petition on a policy of insurance must allege ownership in the insured, both at the time of the issuing of the policy and at the time of the fire.[7] And a petition which fails to aver the ownership of the property, both at the date of the insurance and of its loss, is fatally defective.[8] A petition alleged that defendant for a valuable consideration did insure "the following property of the plaintiff," describing the building, "in the sum of $600." Such a petition unqualifiedly alleges ownership of the property in the plaintiff, which should, after verdict, be held a sufficient allegation by intendment of ownership both at the date of insurance and date of loss.[9] It has been held by the Kansas City court of

[1] Wright v. Bankers' Ins. Co., 73 App. 365; Shaver v. Mercantile Ins. Co., 79 App. 420.

[2] Wright v. Bankers' Ins. Co., 73 App. 365.

[3] Jones v. Philadelphia Underwriters, 78 App. 296.

[4] Duff v. Fire Association, 129 Mo. 460. The decisions to the contrary effect in Duff v. Fire Association, 56 App. 355, and in Trask v. German Ins. Co., 58 App. 431, are overruled.

[5] Richardson v. North Missouri Ins. Co., 57 Mo. 413.

[6] Shaver v. Mercantile Ins. Co., 79 App. 420.

[7] Scott v. Phœnix Ins. Co., 65 App. 75; Wolf v. Sun Ins. Co., 75 App. 306.

[8] Clevinger v. Northwestern Nat. Ins. Co., 71 App. 73; Jones v. Philadelphia Underwriters, 78 App. 296; Harness v. National F. Ins. Co., 62 App. 245.

[9] Prendergast v. Dwelling House Ins. Co., 67 App. 426.

appeals that an allegation that defendant insured plaintiff on "his" stock of goods is not a sufficient allegation of plaintiff's interest in the goods, and that the defect is not cured by verdict.[1] But about the same time that decision was rendered the St. Louis court of appeals held that, from such use of the word "his," an allegation of ownership is necessarily implied, at all events after verdict;[2] and the Kansas City court of appeals has also reached the same conclusion, having decided in 1899 that the doctrine of the *Clevinger* case[1] was not supported by reason, and that the word "his" made the averment equivalent to an averment of ownership; and that, even if it was a defective averment, it was cured by verdict.[3] Even if the ownership is defectively averred in the petition, but language is used which clearly indicates ownership, and from which ownership is reasonably inferable, the petition is sufficient to support a judgment in plaintiff's favor, *i. e.*, it is good after verdict.[4] And if the petition fails to aver either directly or indirectly the ownership of the property, plaintiff may be allowed, after a verdict in his favor, to amend the petition by asserting such allegation.[5] An allegation that "plaintiff had an interest in all of the property insured as the owner thereof, to an amount exceeding the amount of the insurance on the property," is an averment of his ownership of the property insured.[6] But if it is alleged that plaintiff ran and conducted the business at the place mentioned in the policy, and was so owning and conducting it at the time of the fire, this is neither an express statement of ownership of the property, nor is it one from which such ownership must be necessarily inferred.[7]

§ 395. **Insurance—Alleging value.**— Where the action is on a policy of fire insurance for the loss of household goods, if the petition fails to state the value of the goods, it is not sufficient.[8] The petition must allege the value of the goods at the

[1] Clevinger v. Northwestern Nat. Ins. Co., 71 App. 73.

[2] Bondurant v. German Ins. Co., 73 App. 477.

[3] Shaver v. Mercantile Ins. Co., 79 App. 420. I confess that I cannot see any possible ground upon which, under the language of section 592 of the Code, a court should have any hesitancy in holding that the averment that the insurance was taken "on *his* stock of goods," or "on *his* property," is a direct averment that plaintiff owned the goods or the property. See Eans v. Exchange Bank, 79 Mo. 182; Warnick v. Baker, 42 App. 439.

[4] Jones v. Philadelphia Underwriters, 78 App. 296.

[5] Cagle v. Chillicothe Ins. Co., 78 App. 431.

[6] Shaver v. Mercantile Ins. Co., 79 App. 420; Jones v. Philadelphia Underwriters, 78 App. 296.

[7] Story v. American Cent. Ins. Co., 61 App. 534.

[8] Story v. American Cent. Ins. Co.,

time of their destruction.[1] The words "to plaintiff's damage in the sum of $400" is a mere conclusion of law, and cannot be considered an averment of the value of the property destroyed.[2]

**§ 396. Action upon accident policy.**—In an action upon an accident insurance policy the petition must expressly allege that the injury from which the assured died was incurred by him from external, violent and accidental means.[3] A petition alleged the issuance of the policy for a valuable consideration, the relation of the plaintiff to the assured, the death of the assured by an accident not excepted in the policy, that proofs of death were duly furnished in accordance with the requirements of the policy, and that the plaintiff had duly performed all the conditions of the policy on her part. It was held that nothing more was necessary to be stated to entitle the plaintiff to recover.[4]

**§ 397. Action on benefit certificate.**—In an action against a benefit or assessment society the petition is defective if it fails to aver that due proof has been made of the death of the holder of the certificate.[5] Where the certificate provides that in case of the death of a member the association will make an assessment on its surviving members and pay the amount collected, not exceeding $1,000, to the beneficiary, a petition is good which, after the allegations as to the issuance of the certificate, the death of the member, the notice, etc., avers that the defendant had refused to make the assessment which it had agreed to make, and that if such assessment had been made, defendant could and would have realized the sum of $1,000.[6] Where a certificate in such an association was surrendered by the member for a valuable consideration, and after his death the beneficiary claimed that the member was insane at the time of the surrender, and that the surrender was therefore void, but does not allege in her petition that the member was at the time under guardianship, nor that plaintiff was ready to return the consideration received by the member for the surrender, and was willing to pay all assess-

61 App. 534; Green v. Lancashire Ins. Co., 69 App. 429; Wright v. Bankers' Ins. Co., 73 App. 365; Sappington v. St. Joseph Mut. F. Ins. Co., 72 App. 74.

[1] Ramsey v. Philadelphia Underwriters, 71 App. 380.

[2] Story v. American Cent. Ins. Co., 61 App. 534.

[3] Hester v. Fidelity & Casualty Co., 69 App. 186.

[4] Howe v. Pacific Mut. Life Ins. Co., 75 App. 63.

[5] Taylor v. National Temperance Relief Union, 94 Mo. 35.

[6] Taylor v. National Temperance Relief Union, 94 Mo. 35; Herndon v. Triple Alliance, 45 App. 426.

ments which the member would have been obligated to pay subsequent to the time of the surrender, it is fatally defective.[1]

§ 398. **Proceeding for injunction.**— The rules governing bills for an injunction will be found in sections 484, 485, *post.*

§ 399. **Action on judgment.**— Where the action is based upon a judgment of a circuit court of the United States, it is not necessary to set out the facts showing that the federal court had jurisdiction.[2]

§ 400. **Reviewing judgment.**— Where a defendant who has not appeared or been summoned, but has been brought in by publication, applies under sections 777 and 780[3] for a review of such judgment, his application must show that the petition upon which the judgment was procured is untrue in some material matter, or that he has and then had a good defense to the petition; and such defense must be set forth substantially as is required in an answer.[4]

§ 401. **Action between landlord and tenant.**— In an action for use and occupation the petition must state that the relation of landlord and tenant existed between the parties.[5] The petition is good if it alleges that the use was permitted, though it does not aver that the right to compensation for such use was reserved, and does not state when the occupation and user began.[6]

§ 402. Where a bill is filed to restrain a nuisance, alleging that plaintiff is a tenant and occupier of the premises, without stating the nature and duration of the tenancy, this is equivalent to an averment of a tenancy from month to month.[7] Where a tenant brings an action against his landlord for injury to his crops, and merely recites a renting of the premises on shares, and states that the landlord's cattle broke into the field and destroyed the crops, it states no cause of action.[8]

§ 403. **Actions for malicious prosecution.**— In an action for malicious prosecution, a petition is good which alleges in substance that the defendant, acting with malice and without prob-

[1] Wells v. Covenant Mut. Ben. Ass'n, 126 Mo. 630.

[2] Wonderly v. Lafayette County, 150 Mo. 635.

The decisions as to pleading jurisdiction will be found in § 273, *ante.*

[3] Rev. Stat. 1899.

[4] Lindell Real Estate Co. v. Lindell, 142 Mo. 61.

[5] Young v. Downey, 145 Mo. 261. See also Walker v. Mauro, 18 Mo. 564.

[6] Allen v. Wabash, St. Louis & Pac. R. Co., 84 Mo. 646. Consult also petitions in actions for trespass, § 478, *post.*

[7] Clark v. Thatcher, 9 App. 436.

[8] Fenton v. Montgomery, 19 App. 156.

able cause, procured the issue of a warrant charging the plaintiff with a crime, that plaintiff was arrested on the warrant, that the prosecution has been dismissed by the defendant, and the plaintiff discharged.[1] If the petition omits to state that the prosecution was malicious, and that the plaintiff was acquitted, it is insufficient.[2] If the action is against a municipal corporation, based upon a malicious prosecution of a suit for taxes, the petition must allege facts sufficient to enable the court to determine whether or not the corporation had authority to levy, impose and collect the taxes involved, and it must also appear what they were for, and when and how they were imposed.[3] If the action against the municipal corporation is for a false imprisonment by its officers, the petition is fatally defective if it fails to state that defendant was arrested for the violation of one of the city ordinances, or omits to set out the cause of said arrest.[4] If the petition admits that plaintiff was convicted of the charge preferred against him, but alleges that such conviction was brought about by the fraudulent practices of the defendant, and that by defendant's abuse of legal process plaintiff was deprived of the testimony of his principal witness, it states a cause of action, since such acts of defendant countervail the presumption arising from plaintiff's conviction.[5]

§ **404. For malicious attachment.**— Where the action is for a malicious attachment, if the petition does not allege both want of probable cause and malice, it is fatally defective.[6] And it is not sufficient to allege malice, if there is no averment of a want of probable cause;[7] for in the absence of an allegation of a want of probable cause, the presumption is that the attaching plaintiff had reasonable cause to bring the action.[6] If, however, the action is not founded upon a malicious suing out of the attachment, but is simply for a wrongful attachment, and is an action of such a nature that it might have been maintained upon the attachment bond, there is no occasion for an allegation of malice and want of probable cause, and such allegation will be improper. Yet, if plaintiff seeks to recover for a malicious attachment, he may in a single count allege the wrongful attachment and the existence of malice, and if he fails to establish the malice he may

[1] Eagleton v. Kabrich, 66 App. 231.
[2] Mooney v. Kennett, 19 Mo. 551; Hilbrant v. Donaldson, 69 App. 92.
[3] Brown v. Cape Girardeau, 90 Mo. 377.
[4] Worley v. Columbia, 88 Mo. 106.
[5] Boogher v. Hough, 99 Mo. 183.
[6] Witascheck v. Glass, 46 App. 209.
[7] Moody v. Deutsch, 85 Mo. 237.

nevertheless recover such damages as would be recoverable in an action on the bond.[1] The same rule applies in an action for malicious attachment as in an action for malicious prosecution, that the petition must show a termination of the proceeding. Therefore a petition in an action for malicious attachment which fails to show either that the attachment proceeding has terminated in favor of the attachment defendant, or that it has terminated against him and that he had no opportunity to defend against it, is fatally defective, and the defect is not cured by verdict.[2]

§ 405. **Actions for malpractice.**— A petition in an action against a physician for malpractice which alleges that defendant so negligently, carelessly and unskilfully treated and managed said injury that said fractured bones were not set and placed, and caused to remain in their proper positions, is a sufficient statement of a cause of action.[3] If the petition alleges that the defendant undertook to reduce and set a bone, and to attend, cure and heal the same, and also alleges that he promised to carefully and skilfully perform said service, but that he carelessly, negligently and unskilfully failed to set, locate and reduce the dislocation, etc., it cannot be construed as alleging an express promise to cure, but only such an undertaking as the law implies, that is to employ reasonable skill and diligence.[4]

§ 406. **Breach of promise of marriage.**— In an action for breach of promise to marry, if the promise alleged does not ascertain and fix the time of the marriage, the petition must allege a special request by plaintiff that defendant marry her, unless defendant by marrying another has incapacitated himself from performing his engagement; and in such case that fact should be alleged. Plaintiff must also aver not only that defendant did not marry her, but also that she was willing and offered to marry him, and that he refused her before suit was brought; or, at least, that there was upon his part so positive and unequivocal a refusal to marry her, as would as a matter of law relieve her of the necessity of actually offering to marry him.[5] There must be an allegation that defendant promised to marry plaintiff in consideration of the plaintiff's promise to marry defendant.[6] An independent action for seduction cannot be joined with an action for breach of promise.[4] But the woman, and she alone, can main-

[1] Fry v. Estes, 52 App. 1.

[2] Freymark v. McKinney Bread Co., 55 App. 435. As to pleading malice generally, see *ante*, § 335.

[3] Carpenter v. McDavitt, 53 App. 393.

[4] Vanhooser v. Berghoff, 90 Mo. 487.

[5] Cole v. Holliday, 4 App. 94.

[6] Roper v. Clay, 18 Mo. 383.

tain an action for seduction accomplished under a promise of marriage.[1]

**§ 407. Actions between master and servant—For services.**— Where an employee has been improperly discharged by his employer before his term of service has expired, there are two remedies open to him. He may immediately bring his action for breach of the contract of employment, or he may wait until the end of the term for which he was employed and then sue for his entire wages.[2] Both these remedies are based upon the theory that the contract is still valid and subsisting. He may, however, elect to treat the contract as rescinded, and recover on a *quantum meruit* for the services actually rendered.[3] If the action is brought before the expiration of the term, the measure of damages is not the contract price of his services for the whole term, but the amount of the damages is a question for the jury under all the circumstances of the case.[4] If the party proposes to consider the contract rescinded and recover for the value of the services rendered, he must set out the contract, the rendition of services thereunder, the wrongful termination of the contract by the defendant, and then declare for the value of the services rendered.[5] A petition which sets forth that plaintiff was employed by defendant for one year at a stated price per month, that he worked for defendant for several months, and was willing to work the remaining portion of the time, but that defendant failed and refused to comply in any manner with the terms of the contract, and to pay plaintiff for the services rendered, and which contains a prayer for judgment for the year's salary, is bad, since the failure to pay plaintiff's salary would justify him in abandoning the employment, and would entitle him to recover for the services actually performed, but would not authorize a recovery for the work which was unperformed.[6]

**§ 408. Master and servant — Injury to employee.**— Where the relation of employer and employee between the parties at the time of the injury is sufficiently alleged in the petition, the law does not require plaintiff to plead defendant's legal duty to him as an employee. Thus, where it is alleged that while plaintiff

[1] Comer v. Taylor, 82 Mo. 341.

[2] Booge v. Pacific Railroad, 33 Mo. 212; Halsey v. Meinrath, 54 App. 335.

[3] Ehrlich v. Ætna Life Ins. Co., 88 Mo. 249.

[4] Ream v. Watkins, 27 Mo. 516.

[5] Glover v. Henderson, 120 Mo. 367.

[6] Weber v. Union Mutual L. Ins. Co., 5 App. 51.

For action by real-estate agent for commissions, see § 449, *post*.

was in the employ of defendant he was required by defendant to work in a place which was rendered unsafe and dangerous by reason of certain negligent acts and doings of men engaged in repairing defendant's factory, in consequence of which he was injured, the petition is sufficient. Whether this constituted a breach of defendant's duty is a conclusion of law, which plaintiff is not required to plead.[1]

§ 409. **Same — By defective appliances.**— Where an action is brought by an employee based upon the employer's negligence in furnishing improper appliances, the petition must charge that the employer either knew or might have known of the dangerous and defective construction of the appliance, or it must contain some equivalent averment.[2] An allegation that defendant negligently furnished plaintiff an appliance which was not safe or sound is an equivalent averment, and is sufficient.[3] If the defect is pointed out with particularity, it is not necessary that the allegation should show whether the defect was in the original construction or arose from want of repair.[4] Plaintiff is not bound to state whether or not the employee was experienced or inexperienced, or whether the employer had given him any assurance of the sufficiency of the appliance, or whether the danger to which he was subjected was obvious or hidden.[5] Nor need it be alleged either that plaintiff did not know, or could not have known by the exercise of ordinary care, the dangerous or defective construction of the appliance.[6] A petition which charges that a railroad company negligently and carelessly permitted a loose iron rail to remain upon the path alongside the track used by switchmen in the necessary discharge of their duties, by reason of which the injury occurred, is not defective because it failed to allege that the agents of defendant had knowledge, or by ordinary attention to their duties would have known, that the rail lay upon the path.[7]

§ 410. **Same — By an incompetent fellow-servant.**— Where the petition charges that the injury was caused by the negligence of a co-employee, and alleges that defendant failed to em-

[1] Sackewitz v. American Biscuit Co., 78 App. 144.

[2] Current v. Mo. Pac. R. Co., 86 Mo. 62; Crane v. Mo. Pac. R. Co., 87 Mo. 588; Johnson v. Mo. Pac. R. Co., 96 Mo. 340.

[3] Johnson v. Mo. Pac. R. Co., 96 Mo. 340; Crane v. Mo. Pac. R. Co., 87 Mo. 588.

[4] Gutridge v. Mo. Pac. R. Co., 94 Mo. 468.

[5] Fugler v. Bothe, 43 App. 44.

[6] Crane v. Mo. Pac. R. Co., 87 Mo. 588.

[7] Hall v. Mo. Pac. R. Co., 74 Mo. 298.

ploy skilful servants, but fails to allege want of care and diligence in the selection of its servants, it is bad.[1]

**§ 411. Liability of employer for employee's act.**— In an action brought by a third person against an employer, based upon the acts of the employee, the first point to be decided in determining the liability of the employer is whether the acts complained of were such as were within the authority of the employee. That point being settled, there remains the question of pleading. What averments as to the authority is it necessary for the plaintiff to make? To render the employer liable, the act of the employee must have been done in the line of his employment, and in furtherance of the employer's business.[2] Beyond the scope of his employment the employee is as much a stranger to his employer as is any third person.[3] It logically follows that the petition in such a case must either contain direct averments that the employee was acting in the line of his employment, and that the act complained of was done in furtherance of the business of his employer, or facts must be alleged from which the law will infer the duty and the authority of the employee. In the case last cited,[3] it is held by a majority of Division No. 2 that, if the petition states the relation from which the duty and authority necessarily flow, it is sufficient, without a formal averment.[4] In a later decision by the court of appeals it is said that, though the petition does not contain an allegation that the act was committed by the employee while he was in discharge of the particular duties pertaining to that employment, yet the petition is not demurrable on that ground, if the omitted allegation might reasonably be implied from other allegations in the petition.[5] But that these decisions do not warrant the conclusion that a mere general averment of the relation, and that the act was committed by the employee, is sufficient, is evident from what is said in *Snyder v. Hannibal & St. J. R. Co.*,[6] Hough, J., expressing the unanimous opinion of the court. He says: "The mere fact that a tortious act is committed

[1] Moss v. Pacific Railroad, 49 Mo. 167. Sections 421 *et seq.*, *post*, should be consulted in this connection.

[2] See cases cited in Pattison's Digest, vol. 3, pp. 2321 *et seq.*, vol. 5, p. 640.

[3] McPeak v. Mo. Pac. R. Co., 128 Mo. 617.

[4] From this view Sherwood, J., dissented. The decision appears, however, to be in line with the earlier decisions of Travers v. Kansas Pac. R. Co., 63 Mo. 421, and Voegeli v. Pickel Marble Co., 49 App. 643.

[5] Todd v. Havlin, 72 App. 565.

[6] 60 Mo. 413.

by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment. The general statement that the acts of defendant's servants were within the range of their employment is a mere conclusion of law which cannot help the averment of facts and can avail nothing."[1]

§ 412. **Action to enforce a mechanic's lien.**— In its main features a petition in an action to enforce a mechanic's lien does not differ from a petition in an ordinary action at law. Section 4210[2] expressly provides that the pleadings and other proceedings shall be the same as in ordinary civil actions, except as otherwise provided in the statute. But in such cases the petition must contain certain additional averments, so as to clearly set forth a compliance with the statutory requirements essential to perfect the lien. The section just cited provides in this respect that the petition must allege the existence of the facts necessary for securing a lien under the statute, and must contain a description of the property to be charged with the lien. Every fact necessary to secure the lien must appear in the petition itself, and it is not sufficient that the lien paper filed with the circuit clerk shows these facts.[3] The petition must show that the contract was made with some one having an estate or interest in the land on which the improvement was erected, and must also show who is the owner of the land.[4] If it fails to state, at least by necessary implication, that the improvement was erected under a contract with one having an interest or ownership in the land to be charged, it is fatally defective even after verdict.[5] If there is a general allegation that one defendant was the owner and the other the original contractor, it will be assumed that the one named as original contractor made the contract with the one named as owner.[6] It is not a fatal defect that the contract is alleged to have been made with the husband while the land belonged to the wife, if the allegation sufficiently shows that the contract was made for her use.[7] If the action is by a subcontractor, an averment is not necessary that the materials were fur-

[1] 60 Mo. 419.
[2] Rev. Stat. 1899.
[3] Fay v. Adams, 8 App. 566.
[4] Porter v. Tooke, 35 Mo. 107.
[5] Peck v. Bridwell, 6 App. 451.
[6] Cole v. Barron, 8 App. 509.
[7] Burgwald v. Weippert, 49 Mo. 60.

nished or the labor performed by plaintiff upon request of the owner of the property.[1]

§ 413. The petition should set out the date when the materials were furnished and the labor was done, and when the account accrued, and also the date of the filing of the lien.[2] It must not only show the date of the filing, but it must show that the account was filed in the proper office.[3] Plaintiff need not, however, allege that he commenced his suit within ninety days after the filing of the lien.[4] If there is an allegation that the demand became due on a certain day, and that within four months thereafter the account, etc., for the lien was filed, this is the statement of a constitutive fact and not of a mere conclusion of law.[5]

§ 414. In an action brought by a subcontractor it is essential that the petition should show that the materials were furnished for the building described; it is not sufficient to allege merely that the materials actually went into the building,[6] although this last allegation also appears to be necessary.[7] But it would seem that this last averment is not essential where the materials were furnished directly to the owner of the property; it is only essential where they are furnished to a contractor or a subcontractor.[8]

**§ 415. Proceeding to foreclose a mortgage.**— A mortgagee has three concurrent remedies. He may file his bill to foreclose; or he may bring an action at law for the recovery of the mortgage debt; or he may, after there has been a forfeiture, bring an action of ejectment to recover possession of the mortgaged premises.[9] He may resort to any one or more of these concurrent remedies, and does not lose his right to foreclose by obtaining a general judgment on the secured notes.[10] And the *cestui que trust* in a deed of trust has the same choice of concurrent remedies.[11]

§ 416. A petition for the foreclosure of a mortgage under section 4342[12] is a proceeding at law and not in equity. And the juris-

[1] McLaughlin v. Schawacker, 31 App. 365.

[2] Heltzell v. Langford, 33 Mo. 396; Bradish v. James, 83 Mo. 313.

[3] Gault v. Soldani, 34 Mo. 150.

[4] Twitchell v. Devens, 45 App. 283.

[5] Henry v. Hinds, 18 App. 497.

[6] Fathman & Miller Planing Mill Co. v. Ritter, 33 App. 404.

[7] Grace v. Nesbitt, 109 Mo. 9.

[8] Rall v. McCrary, 45 App. 365.

[9] Thornton v. Pigg, 24 Mo. 249.

[10] Kansas City Savings Ass'n v. Mastin, 61 Mo. 435.

[11] Owings v. McKenzie, 133 Mo. 323.

[12] Rev. Stat. 1899.

diction must be exercised not according to the doctrines and practice of equity, but according to the practice and principles of law.[1] But while it is a legal proceeding, it has never been held in this state that the above section deprives the court on its equity side of jurisdiction to afford relief in proper cases; and the general rule that courts of equity have jurisdiction in such cases is well established.[2] The statutory mode of procedure is not exclusive.[3] If the proceeding is brought under section 4342, and the debt consists of more than one note, it seems that the petition should count separately on each note.[4]

§ 417. **Suits by or against municipal corporations.**— In an action by a municipality, an allegation that plaintiff is a corporation duly incorporated under and by virtue of a certain act is sufficient.[5] And a public act creating a municipal corporation need not be pleaded.[6] Where in an action against a city it is alleged that defendant is a corporation created and organized under the provisions of article V of chapter 89 of the Revised Statutes,[7] this is a sufficient allegation that the city is incorporated as a city of the fourth class.[8] Where a municipality is organized under a general statute requiring the action of the county court, it is not necessary in alleging its existence to set out the facts preliminary to the grant of the order, and upon which the order was founded.[9] If it is incorporated by a private act, such act must be pleaded and proved. It is sufficient, however, to plead it by its title and date of passage; and when so pleaded the court will take judicial notice of its provisions, and it is not necessary for plaintiff to produce it in evidence.[10]

§ 418. **Same — Action on concession.**— A city conceded to certain parties certain rights as to supplying the city with water. These rights were afterwards assigned to a third party, who

[1] Mason v. Barnard, 36 Mo. 384; Fithian v. Monks, 43 Mo. 502; Smith v. Finn, 77 Mo. 499.

[2] Wolff v. Ward, 104 Mo. 127.

[3] Rubey v. Forcht, 21 App. 159. A bill in equity for foreclosure which is approved by the supreme court will be found in Wolff v. Ward, 104 Mo. 127.

[4] Dewey v. Leonhardt, 27 App. 517.

For decisions in case of a bill to redeem or to set aside a foreclosure sale, see §§ 487–489, *post.*

[5] Chillicothe Savings Ass'n v. Ruegger, 60 Mo. 218.

[6] Nutter v. Chicago, R. I. & Pac. R. Co., 22 App. 328; Bowie v. Kansas City, 51 Mo. 454.

[7] Rev. Stat. 1879.

[8] Eubank v. Edina, 88 Mo. 650.

[9] State ex rel. v. Weatherby, 45 Mo. 17.

[10] O'Brien v. Wabash, St. L. & Pac. R. Co., 21 App. 12; Apitz v. Mo. Pac. R. Co., 17 App. 419; Harlan v. Wabash, St. L. & Pac. R. Co., 18 App. 483.

made a contract with the city in accordance therewith. In an action brought on the contract, the petition contained no reference to the assignment to plaintiff of the rights of the original parties named in the concession from the city. But it was held that this omission was not fatal to the petition, since it was not essential that plaintiff should set up the intermediate assignments by which he secured his right, he having himself made the contract.[1]

§ 419. **Same — Suit by officer.**— In an action against a city to recover the fees and emoluments of office of which plaintiff claims he has been wrongfully deprived, his petition must allege either that he was in possession of the office and was wrongfully ousted from it, or that he claimed the fees and that such claim has been judicially determined to be good.[2]

§ 420. **Same — For personal injuries.**— In an action against a city to recover for injuries caused by a defective sidewalk, the petition must allege, either directly or by necessary implication, that the sidewalk was in an unsafe or dangerous condition for ordinary travel. It is not sufficient to allege that the sidewalk was defective or imperfect.[3] It is not necessary to allege that the defendant city knew of the particular opening or defect in the sidewalk which caused the injury. It is sufficient if the petition contains an allegation that the walk was defective at the place of the injury, that the city officials knew of its condition, or that the condition had existed for such a length of time as to raise the presumption of knowledge on their part, and that the injury was the result of defendant's failure to repair the walk.[4] It is not essential in such an action that the petition should contain an averment that the city owned the sidewalk, or that it authorized its construction, or that it had adopted it as its own, provided there are other allegations in the petition showing the duty of the city to keep the sidewalk in repair.[5] If the injuries were caused by an obstruction in the street, and the petition charges that the defendant failed and neglected to keep the street in a safe and suitable condition for the use of the public, and unlawfully and negligently suffered the same to be obstructed, it

[1] Lamar Water & El. Co. v. Lamar, 140 Mo. 145.

[2] Hughlett v. Wellsville, 75 App. 341. See also *post*, §§ 440–444.

The rules governing petitions to recover municipal taxes will be found in §§ 474, 475, *post*.

[3] Young v. Kansas City, 45 App. 600; Plummer v. Milan, 70 App. 598.

[4] Rusher v. Aurora, 71 App. 418.

[5] Haire v. Kansas City, 76 Mo. 438.

charges facts from which it may be reasonably inferred that defendant had notice of its dangerous condition, and will be held good after verdict.[1] Where a pond was situated partly on the street of a city and partly on an adjoining lot belonging to a private owner, and a child skating on the pond broke through and was drowned, if the action against the city is based on the ground that the pond was a public nuisance which the city was bound to abate, there must be an allegation that the child broke through the ice on that portion of the pond which was within the limits of the city.[2]

§ 421. **In actions based on negligence.**— In actions for injuries occasioned by negligence, it must be borne in mind that, even under the code system, the fundamental principle is to be applied that the petition to be valid must contain such facts as, if they were admitted, would justify the court in rendering judgment for the plaintiff.[3] There can be no recovery upon a general allegation of negligence which gives no notice of facts, but states only conclusions.[4] The acts, which it is intended to show were negligently done or omitted to be done, should be set out with a reasonable degree of particularity, and in some appropriate form of expression it must be charged that they were negligently done, or that there was a negligent omission of some duty; the defendant will then be notified with what he is charged.[5] The mere allegation that defendant allowed its employees to neglect their duties, without alleging how or wherein, is not sufficient.[6] Care must be taken that the charge is sufficiently specific to advise the defendant of what he is called upon to meet.[7] And if the petition sets out a particular act of negligence, no other can be proved.[8] For even if general allegations of negligence are used in connection with a statement of specific acts, as explanatory of the specific statement, they will not entitle the plaintiff to recover on grounds other than those specifically stated.[9] Thus,

[1] Hurst v. Ash Grove, 96 Mo. 168.

[2] Arnold v. St. Louis, 152 Mo. 173. The reader should also consult § 421 *et seq.* For actions against a municipality for injury to property, see § 477, *post.*

[3] McPeak v. Mo. Pac. R. Co., 128 Mo. 617.

[4] Leduke v. St. Louis & I. M. R. Co., 4 App. 485; Murdock v. Brown, 16 App. 549.

[5] Gurley v. Mo. Pac. R. Co., 93 Mo. 445: Jacquin v. Grand Ave. Cable Co., 57 App. 320, in which last case the authorities are cited.

[6] Moss v. Pacific Railroad, 49 Mo. 167.

[7] Wills v. Cape Girardeau Southwestern R. Co., 44 App. 51.

[8] Schneider v. Mo. Pac. R. Co., 75 Mo. 295; Ravenscraft v. Mo. Pac. R. Co., 27 App. 617.

[9] Waldhier v. Hannibal & St. J. R. Co., 71 Mo. 514.

in an action against a railroad company, if the negligence consisted in having a defective sand-box on the engine, and in keeping a defective frog in the track, the petition should not charge negligence in running the cars.[1] The petition is sufficient if its averments of specific acts done by defendant are followed by a general statement of injuries resulting to the plaintiff from such acts.[2]

§ 422. While a general charge of negligence is improper in pleading, and if timely objection is made to it the pleading will be held bad on that account, yet if it is not objected to at the proper time and before trial, it is good as a basis of proof.[3] Generality of averment in an action of negligence is not a fatal objection to the petition after answer.[4] Where the petition is not attacked before the trial, and especially where it is first attacked after verdict, a general statement as to negligence will ordinarily be held to be sufficient.[5]

**§ 423. Same — Various negligent acts may be set forth.**— Since negligence in fact may consist of any number of negligent acts preceding the injury, and leading up to it and contributing to it, in stating his cause of action plaintiff is not obliged to select one of these acts and rely upon it.[6] And plaintiff may allege different forms of negligence on the part of defendant as the cause of the injury, so long as there is no inconsistency between the averments; and inconsistency in this connection means such repugnance that the proof of one of the specific acts necessarily disproves the others.[7]

§ 424. The plaintiff will not be driven out of court simply because his petition alleges more than he has proved, if the unproven allegations are not necessary to authorize a recovery.[8]

**§ 425. Same — Showing connection between the negligence and the injury.**— Where the petition sets out with particularity a city ordinance limiting the speed at which trains may be run within the corporate limits, and providing that a bell shall be continually rung while running within such limits, but the peti-

[1] Edens v. Hannibal & St. J. R. Co., 72 Mo. 212.

[2] Hudson v. Wabash & W. R. Co., 32 App. 667.

[3] Conrad v. De Montcourt, 138 Mo. 311.

[4] Foster v. Mo. Pac. R. Co., 115 Mo. 165.

[5] Foster v. Mo. Pac. R. Co., 115 Mo. 165; Benham v. Taylor, 66 App. 308.

[6] Hill v. Mo. Pac. R. Co., 49 App. 520.

[7] Seiter v. Bischoff, 63 App. 157; Hogan v. Citizens' R. Co., 150 Mo. 36.

[8] Gannon v. Laclede Gas Light Co., 145 Mo. 502.

tion contains no averment connecting such matters with the injury complained of, it is demurrable.[1] In an action by a parent for the death of his minor son, alleged to have been caused by defendant's negligence in allowing an elevator hatchway to remain in a dangerous condition, so that the son fell through it, the petition, after setting forth in general terms the acts and omissions constituting defendant's negligence, proceeded to aver that, in consequence of the aforesaid wrongful acts, neglect and default of defendant, and without fault on his part, the said son fell into and through the hatchway. It was held that the negligence was with sufficient definiteness stated to be the proximate cause of the injury.[2] Where the injuries were sustained by plaintiff while employed by defendant as a section man, the averment of the petition was as follows: "That while, as one of several section men, engaged in unloading a train of cars, the division roadmaster, before the train was unloaded, negligently gave an order to him to board the train, and that, as he was attempting obedience to the order, the roadmaster negligently permitted a railroad tie to be unloaded and thrown from the car, which struck the plaintiff with great force and seriously injured him." It was held that this was a sufficient allegation of the causal connection between the negligence of defendant and the injury to plaintiff.[3]

**§ 426. Same — Violation of ordinance.**— In an action against an electric street railway company, where the charge of negligence is based on the violation of an ordinance which requires the motorman to keep a vigilant watch for all vehicles or pedestrians on the track or moving toward it, and upon the first appearance of danger to such person or vehicle to stop the car in the shortest time and space possible, it is not sufficient to set out such ordinance, but the petition must expressly allege that the defendant railway company, in consideration of its franchise, accepted said ordinance and undertook and agreed to obey its provisions. The duty to exercise the care required by the ordinance did not exist at common law, and the city could not bind the company to exercise such care except upon its agreement. But its assent to the ordinance would create a contractual liability on its part, and its agreement constitutes an essential averment

[1] Lynch v. St. Joseph & Iowa R. Co., 111 Mo. 601.

[2] Schultz v. Moon, 33 App. 329.

[3] Foster v. Mo. Pac. R. Co., 115 Mo. 165.

in the petition.[1] Where the petition contains merely an averment that the defendant, a street railway company, failed to use ordinary care in providing its grip car with a fender to prevent its running over children it had run down and upon, it fails to state a cause of action for negligence. There must be an averment that some statute or ordinance makes it the duty of the company to place fenders on its cars.[2]

§ 427. **Negligence — Further illustrations.**— A wife, suing for damages for the wrongful killing of her husband, alleged that at the time the accident occurred defendant was operating the cars which did the injury, and that deceased in the exercise of proper care and caution was crossing the railway track, when defendant by its agents and servants negligently, carelessly and wrongfully ran its cars against the wagon of the deceased, overturned the same and killed him; it was held that the petition was good as against the objection that it did not specify the particular act of negligence which caused the injury.[3] And a petition was held to be sufficient which alleged that defendant, by its servants, while running and operating a locomotive and train of cars over its road, did so carelessly, negligently, recklessly, heedlessly and unskilfully, run, manage and conduct the same, that they ran against, struck, and fatally wounded the deceased.[4]

§ 428. In an action for damages suffered by an employee, which were alleged to have been caused by a defective coupling, the petition alleged that there was in the train a freight car which was defective and unsafe, and very dangerous to brakemen in coupling and uncoupling, in this, "that the lip on the drawbar at one end of said car was broken off, and the plate on the deadwood on the bumper at the same end of said car was broken and worn out, and said car was so that there was nothing to prevent the drawbar from going back under said car and thereby making it very dangerous and unsafe for brakemen in coupling and uncoupling said car." It was held that these allegations were broad enough to cover any defect in the coupling appliance which rendered it insufficient to keep the drawbar from passing under the car.[5]

[1] Sanders v. Southern Elec. R. Co., 147 Mo. 411.

[2] Hogan v. Citizens' R. Co., 150 Mo. 36.

[3] Pope v. Kansas City Cable R. Co., 99 Mo. 400; the decision being in line with an earlier decision in a somewhat similar case, Sullivan v. Mo. Pac. R. Co., 97 Mo. 113.

[4] Shaw v. Mo. Pac. R. Co., 104 Mo. 648.

[5] Bender v. St. Louis & S. F. R. Co., 137 Mo. 240.

§ 429. In an action for personal injuries received from falling from a freight car, the allegation was that the hand-hold on the car was not safe and sufficient, and that, by reason of said defectiveness and insufficiency, it broke. This was held to amount to an averment that there was a weakness in the fastenings of the hand-hold in consequence of which it broke, and was a sufficiently specific statement of the negligence intended to be charged.[1]

§ 430. In an action based upon the common-law liability of a carrier for failing to carry an animal safely, the petition need only allege general negligence; but if plaintiff specifies the acts of negligence, he will be confined in his proof to those acts.[2] Where the cause of action is based upon negligence on the part of the agents of defendant in increasing the speed of a moving car while a passenger was in the act of stepping aboard, it is essential that the petition should allege the knowledge of defendant's agents, or an opportunity by ordinary care to know, that plaintiff was in the act of mounting the car.[3]

§ 431. In an action against a physician for malpractice, the petition charged that defendant so negligently, carelessly and unskilfully treated and managed the injury that the fractured bones were not placed and caused to remain in proper positions. This was followed by the additional allegation that "said injury was not properly and skilfully treated and managed by the defendant." But it was held that the last clause added nothing to that which preceded it, nor did it render the whole charge more comprehensive than it would have been if the clause had not been added.[4]

§ 432. Where the injury which formed the basis of the action was caused by a defect in a grating in a sidewalk, which grating was maintained by defendant in front of his property, it is not necessary that plaintiff should allege that defendant constructed the grating in the first instance, nor that it was an unlawful obstruction at the time it was constructed. Neither is it necessary to allege that such grating was kept and maintained in the sidewalk as a benefit or convenience to the defendant.[5]

§ 433. Where the action is for injuries received in an elevator shaft of a hotel, and the petition avers that the elevator was

[1] Condon v. Mo. Pac. R. Co., 78 Mo. 567.

[2] Lachner v. Adams Express Co., 72 App. 13.

[3] Worthington v. Lindell R. Co., 72 App. 162.

[4] Carpenter v. McDavitt, 53 App. 393.

[5] Stevens v. Walpole, 76 App. 213.

moved in obedience to the order of the general manager of the hotel, and that plaintiff was injured thereby, but it does not allege that the manager was guilty of negligence in giving the order, plaintiff cannot recover, even though the order was in fact negligent.[1]

§ 434. Where the petition alleged that plaintiff was injured by the negligence of defendant's servants in propelling a car, which he was engaged in unloading, with great velocity against another car, thereby throwing down upon him a part of the freight in said car, it is good.[2] In an action against a railroad company for the death of a child, plaintiff alleged that the company permitted ice, while it was being unloaded from its cars, to fall under and around the same, thereby attracting children, and while plaintiff's child was so attracted, and was under the cars, the company carelessly and negligently bumped a long train of cars against those loaded with the ice, whereby the child was killed. It was held that the petition was fatally defective for the following reasons: *First*, that it failed to charge that the company was itself engaged in the unloading of the cars; *second*, that it did not allege that the cars were being unloaded in a negligent manner; and, *third*, in not stating how long the child had been under the car before it was moved.[3]

**§ 435. Actions under the damage act.**— In actions brought under sections 2864–2866,[4] it is not necessary to state that the action is brought under the statute, nor is it necessary that any reference should in terms be made to the statute.[5] The petition is sufficient, if in general terms it charges that, by reason of defendant's negligence and unskilfulness in running and managing its car or other vehicle, the defendant was run against and killed.[6] But the plaintiff or plaintiffs must, both by the pleading and the proof, bring themselves within the terms of the act.[7] Thus, since the right of the parents to maintain the action under section 2864[8] depends upon the fact that the minor child left

[1] McCarty v. Rood Hotel Co., 144 Mo. 397.

[2] Clay v. Chicago & Alton R. Co., 17 App. 629.

[3] Rushenberg v. St. Louis, I. M. & S. R. Co., 109 Mo. 112.

Illustrations of petitions in actions based on negligence will also be found in §§ 408–410, 420 and 452 *et seq.*

[4] Rev. Stat. 1899.

[5] Kennayde v. Pacific R. Co., 45 Mo. 255; White v. Maxey, 64 Mo. 552.

[6] Le May v. Mo. Pac. R. Co., 105 Mo. 361.

[7] Barker v. Han. & St. J. R. Co., 91 Mo. 86; McIntosh v. Mo. Pac. R. Co., 103 Mo. 131; Dulaney v. Mo. Pac. R. Co., 21 App. 597.

[8] Rev. Stat. 1899.

neither widow nor minor children surviving, unless this fact is alleged, either directly or inferentially, the petition will be fatally defective.[1] If the action is by the mother, the petition need not in express terms aver the death of the father, where the plain import of the language used is that the father was dead; and this is sufficiently alleged if it is stated that plaintiff is a widow.[2] If the action is for injuries to a minor son causing his death, the petition must allege that the minor was unmarried.[3] But if it states that the minor was an infant under two years of age, or that he was six years of age at the time of his death, the petition is not defective because it does not in terms state that he was unmarried, that fact being necessarily inferred from the averments as to his age.[4] If the action is brought by a mother for the death of her minor son, it is not necessary to allege a loss of services.[5] In no case is it necessary that the petition should set out the nature and extent of the injuries which caused the death.[6]

§ 436. Where the action is brought by an infant child of the deceased, the petition must show that plaintiff is an infant, and that he sues by a next friend or guardian.[7] An action for death was brought in the name of the guardian of the minor children of the deceased. Their names were set out in the caption of the petition, but all the allegations of the petition were in the singular number, and the petition concluded with the statement that "he is damaged and asks judgment, etc." But the petition referred to the damage act, under the provisions of which, and the circumstances detailed in the petition, the minors alone, by their guardian or next friend, could recover. It was held that, while the petition was inartificial, yet it did not utterly fail to state a cause of action, and there was at least sufficient in it to support an amendment.[8]

§ 437. **Pleading contributory negligence.**—It is not necessary to aver that the plaintiff or that the deceased was at the time of

[1] Sparks v. Kansas City, S. & M. R. Co., 31 App. 111; McIntosh v. Mo. Pac. R. Co., 103 Mo. 131.

[2] Goins v. Chicago, R. I. & Pac. R. Co., 47 App. 173.

[3] Dulaney v. Mo. Pac. R. Co., 21 App. 597.

[4] Czezewzka v. Benton-Bellefontaine R. Co., 121 Mo. 201; Baird v. Citizens' Ry. Co., 146 Mo. 265.

[5] Hennessy v. Bavarian Brewing Co., 145 Mo. 104. The cases of Matthews v. Mo. Pac. R. Co., 26 App. 75, and Hennessy v. Bavarian Brewing Co., 63 App. 111, are overruled.

[6] Mitchell v. Clinton, 99 Mo. 153.

[7] Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418.

[8] Weber v. Hannibal, 83 Mo. 262.

the injury in the exercise of due care or without fault, since under the practice in Missouri contributory negligence is a substantive defense, and will not be considered unless pleaded by the defendant.[1] Therefore in an action for injuries received from the caving in of a ditch upon plaintiff, the petition is not defective because it does not allege that the plaintiff was ignorant of the dangerous condition of the ditch, since such averment relates only to the defense of contributory negligence, and this must be set up by the defendant as an affirmative defense.[2]

§ 438. **Actions for nuisance.**— It is not necessary to detail all the particular injuries which result from the alleged nuisance.[3] But if it is attempted to specify the particular injuries flowing from a nuisance, all that plaintiff intends to prove must be specifically alleged, since he will be limited in his proof to those set out in his petition.[4] But if the nuisance is a public one, and plaintiff seeks to recover on the ground that he has suffered some special damage over and above that suffered by the community in general, it is the universal rule that he must allege and prove such special damage.[5] Where plaintiff states fully and completely every substantial fact required to sustain the charge that defendant had created a nuisance on plaintiff's property, it is not necessary that he should go further and charge that the acts were wrongfully or unlawfully done. It is only necessary to allege such substantive facts as the law says are wrongful and unlawful.[6] An allegation that a standpipe has been erected by a city near to plaintiff's residence, and that water escaping from said standpipe renders the ground in its vicinity wet, soggy and unhealthy, is so vague and indefinite as to state no actionable facts.[7] Where the action is against a railroad company for constructing its track in a street, for which purpose it erected high embankments in the street, it would seem that it is not necessary to allege that the erection of the

[1] Thompson v. North Mo. R. Co., 51 Mo. 190; Lloyd v. Hannibal & St. J. R. Co., 53 Mo. 509; Petty v. Hannibal & St. J. R. Co., 88 Mo. 306; O'Conner v. Mo. Pac. R. Co., 94 Mo. 150.

[2] Hall v. St. Joseph Water Co., 48 App. 356.

Contributory negligence as a defense is considered in ch. XXVI, §§ 712–714.

As to effect of an allegation in the petition that plaintiff was without fault, and a denial of this allegation, see § 565, *post*.

[3] Pinney v. Berry, 61 Mo. 359.

[4] Pinney v. Berry, 61 Mo. 359; Ivie v. McMunigal, 66 App. 437.

[5] Given v. Van Studdiford, 86 Mo. 149.

[6] Thomas v. Concordia Cannery Co., 68 App. 350.

[7] Whitfield v. Carrollton, 50 App. 98.

embankments was unnecessary, and was the result of negligence in constructing the road.[1]

§ 439. **Same — For continuing a nuisance.**— The law is that one who maintains or adopts a nuisance already existing is responsible for the damages resulting from it to the same extent as though he had created it. Therefore, where an action is brought against a property owner for maintaining a defective grating in the sidewalk in front of his property, it is not necessary for plaintiff to allege that the grating was in the first instance constructed by the defendant, nor that it was an unlawful obstruction at the time it was constructed, nor that it was kept and maintained in the sidewalk as a benefit or convenience to the defendant. He is liable if he maintained the grating in the highway in such a way as to constitute a nuisance, whether he was benefited by it or not.[2] Where the action is based upon the continuance of a nuisance by one who did not originate it, the petition must contain an averment that defendant has by some positive act adopted the nuisance, or that he has permitted it to remain after he has been requested to abate it.[3]

§ 440. **Actions by and against officers.**— In an action against a city to recover the fees and emoluments of office of which plaintiff claims he has been wrongfully deprived, his petition must allege, either that he was in possession of the office and was wrongfully ousted from it, or that he claimed the fees, and that such claim has been judicially determined to be good.[4]

§ 441. **Actions on official bonds.**— In an action on an official bond the petition is sufficient if it alleges that the principal did not faithfully account for all money coming into his hands, and that the balance sued for was due by the defendants.[5] An allegation that a county treasurer has received money which he neglects and refuses to pay to the county insufficiently assigns a breach of his bond, unless it is further averred that warrants for such money had been drawn upon him by order of the county court.[6] Where the action is against a surety on a collector's bond, the petition must allege that the money which the collector failed to pay over was collected during his term of office.[7] But it is not necessary to state for what years the collector was

[1] Cross v. St. Louis, K. C. & N. R. Co., 77 Mo. 318.

[2] Stevens v. Walpole, 76 App. 213.

[3] Rychlicki v. St. Louis, 115 Mo. 662.

[4] Hughlett v. Wellsville, 75 App. 341.

[5] Bricker v. Stone, 47 App. 530.

[6] State to use v. Thomas, 17 Mo. 503. See *post*, §§ 444, 445.

[7] State v. Grimsley, 19 Mo. 171.

elected or his bond was given, provided it is distinctly alleged that while he was collector he collected the money in his official capacity, and that he failed and refused to account for it.[1]

§ 442. **Same — On bond of sheriff or constable.** — In an action on the bond of a sheriff or a constable for failure to levy an attachment on personal property, the petition must contain an allegation that the attachment plaintiff prosecuted his suit to final judgment, since a judgment in his favor in the attachment suit is a prerequisite to his right to maintain an action on the bond.[2] Where the action is on a constable's bond for failure to advise an execution defendant of his exemption rights, the allegation that plaintiff was the head of a family, and as such entitled to claim the property levied on as exempt, is an essential one;[3] but it is sufficient to allege that defendant was the head of a family, without setting out the facts which would constitute him such.[4] In an action against an officer for failing to notify an execution debtor of his exemption rights, it was alleged that plaintiff had certain money in the bank which was less than the amount he was entitled to hold as exempt; that the officer garnished the bank and failed to notify plaintiff of such garnishment and of his exemption rights; that plaintiff afterwards notified the defendant officer that he claimed the money as exempt, and that he demanded it should be paid to him; and that said demand was refused. The petition was held good, it not being necessary to allege that the plaintiff did not have the property mentioned in the first and second subdivisions of section 3159,[5] nor was it necessary to aver that the money in the bank was all the property which he possessed, nor that when added to his other property it would not have exceeded in value the statutory exemption.[6]

§ 443. **Same — Executor or administrator.** — If the action is on an executor's bond to compel payment of a demand allowed against the estate, the petition must contain an averment that an order of the court has been made for the payment of the demand, and that assets have come to the hands of the executor which could be lawfully so applied; an order of the probate court for

[1] Morgan County v. Lutman, 63 Mo. 210.

[2] Lesem v. Neal, 53 Mo. 412; State ex rel. v. Finn, 98 Mo. 532; Shanklin v. Francis, 59 App. 178.

[3] State to use v. Bacon, 24 App. 403.

[4] State to use v. Hussey, 7 App. 597; Duncan v. Frank, 8 App. 286.

[5] Rev. Stat. 1899.

[6] State ex rel. v. Brady, 53 App. 202; Duncan v. Frank, 8 App. 286.

the payment of the demand is a condition precedent to the action on the bond.[1] If the petition shows that the administrator failed to comply with an order of payment made by the probate court on final settlement, it states a good cause of action, though there is no averment attempting to show whether the funds were actually lost to the estate before or after the execution of the bond.[2] An averment that the administrator did not turn over, and has not turned over, to plaintiff the sum of $——, as by the condition of his said bond, and the order of said probate court as aforesaid, he was in duty bound to do, though often requested to do so, is a sufficient assignment of a breach of the bond.[3] In an action on the bond of an administrator based upon the ground that improper allowances were made to him on his final settlement, it is not sufficient to allege that he illegally procured such allowances to be made in his favor; there must be an allegation that they were procured by fraud.[4] Where the action is brought by the successor in office of the administrator, the fact of defendant's appointment as administrator must be alleged, though it may be alleged in general terms.[5] If the action is on the bond of an administrator who had died after receiving the money, it is sufficient to allege that such administrator did not account for and deliver said money according to law, and that since his death his legal representatives have not paid the same; it need not be further alleged that the deceased administrator had an administrator or executor.[6] But in an action against an executor of an executor upon the bond of the latter, it is necessary to allege that neither the executor in his life-time nor his executor since have performed the act required.[7]

§ 444. **Same — County collector or clerk.**— In an action brought by a city on the bond of a tax collector for a failure to enforce the payment of a certain tax, the petition must show that the proper tax book or legal warrant was delivered to the collector.[8] In an action against a collector for a wrongful levy on property to satisfy a tax-bill, the petition must allege that the

[1] State to use v. Modrell, 15 Mo. 421; State ex rel. v. Stafford, 73 Mo. 658; State ex rel. v. Shelby, 75 Mo. 482.

[2] State ex rel. v. Creusbauer, 68 Mo. 254.

[3] State to use v. Bartlett, 68 Mo. 581.

[4] Jones v. Brinker, 20 Mo. 87; Whittelsey v. Dorsett, 23 Mo. 236.

[5] Dodson v. Scroggs, 47 Mo. 285.

[6] Finney v. State, 9 Mo. 624.

[7] State to use v. Petticrew, 19 Mo. 373.

[8] City of Stanberry v. Jordan, 145 Mo. 371.

assessment is void; it is not sufficient to set forth objections which go merely to the manner and form of making the assessment, and which come short of showing a total want of power in the authorities to act.[1]

§ 445. Where a county clerk makes a statement to the county court of the fees received by him, which statement is correct, but fails to pay into the treasury the excess of fees collected by him as required by section 3265,[2] a petition in an action on his bond for such failure must contain an averment that the court examined his settlement, ascertained the amount of the excess which was due the county, and ordered such excess paid into the county treasury.[3] But these allegations are not necessary where it is alleged that the clerk was guilty of fraud and deceit in filing statements which omitted a part of the fees received by him. In that case, if the petition alleges that the clerk collected fees which he failed to report to the county court, it states a causes of action, since under such circumstances the court is not required to make the order as a condition precedent to an action on the bond.[4] So, too, in an action by a county against the sureties of a defaulting county treasurer, it is not necessary that the petition should aver that an order was made by the county court upon the treasurer to turn over all balances to his successor; nor, if the treasurer's term has expired, is it necessary to allege that a warrant was drawn on the treasurer for the balance due.[5] In an action by the state on a collector's bond for failure to pay into the state treasury the amount of certain taxes collected by him as such, it being alleged that the taxes belonged to the state revenue and state interest fund, it is not necessary that the petition should go further and negative the presumption that the collector paid the amounts collected into the county treasury, since such an allegation would be inconsistent with the theory of the case.[6]

**§ 446. Suit involving partnership.**— Where partners are sued for a partnership debt, there need not be any allegation of a partnership; the allegation that defendants are indebted is sufficient.

[1] Mayor v. Opel, 49 Mo. 190.

[2] Rev. Stat. 1899.

[3] State ex rel. v. Dent, 121 Mo. 162; State ex rel. v. Henderson, 142 Mo. 598.

[4] State ex rel. v. Henderson, 142 Mo. 598; State ex rel. v. Chick, 146 Mo. 645.

[5] Clark County v. Hayman, 142 Mo. 430; Hickory County v. Fugate, 143 Mo. 71.

[6] State ex rel. v. Seibert, 148 Mo. 408. See also § 441, *ante*.

For petition in actions on ordinary bonds, see *ante*, §§ 360–364.

Nor need it be alleged that the contract was made by one partner for the benefit of the firm.[1] In an action on a note payable to a firm, it is not necessary to allege that the note was made to the payees by their firm name.[2] If a bill is filed for an accounting between the partners, it must either state or pray for an account.[3]

§ 447. **Proceeding to recover a penalty.**— Where it is sought to recover a penalty created by statute, the petition must state the facts necessary to bring the case within the statute; for if it states only such facts as would constitute a cause of action for trespass at common law, and refers only generally in the prayer to the statute, it is not sufficient.[4] Thus where the action is brought under section 4572[5] for treble damages for one of the trespasses therein specified, if the petition merely alleges that the defendant without leave entered upon the premises and carried away the stone, or other article, mentioned in the section, and does not allege that the defendant entered upon land which was not his own, and that he had no interest or right in the article carried away, it simply states an action at common law, and the petition is not sufficient to support a judgment for treble damages.[4] The general rule applicable to the construction of a penal statute is that no cases will be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Therefore, in actions on penal statutes the plaintiff's statement of his cause of action cannot be helped out by intendment, nor can a defective or imperfect allegation be cured by verdict. Every fact essential to a recovery must be affirmatively pleaded.[6] In an action to recover the penalty provided by section 1255[7] for neglect by a telegraph company to promptly transmit a message delivered to it, the petition must allege that the message was delivered at the company's office, and that plaintiff paid or tendered to the company the usual charge for its transmission. It is not sufficient to allege that the message was delivered to the agent and operator of the company in the city where its office is located; nor is it sufficient to aver that the plaintiff paid the agent of the company the sum of twenty-five cents, without an additional

[1] Gates v. Watson, 54 Mo. 585.
[2] Lee v. Hunt, 6 Mo. 163.
[3] Pope v. Salsman, 35 Mo. 362.
[4] Pitt v. Daniel, 82 App. 168.
[5] Rev. Stat. 1899.
[6] Wood v. Western Union Telegraph Co., 59 App. 236; State to use v. Wabash, St. L. & P. R. Co., 83 Mo. 144.
[7] Rev. Stat. 1899.

averment that such sum was the usual charge for such messages.[1] So, too, where the action is to recover the penalty for a failure to erect a passenger waiting-room at a railroad crossing, the petition is fatally defective if it fails to allege that both the intersecting railroad companies were carriers of passengers.[2]

§ 448. **Same — Penalty stipulated for in contract.**— Where a certain sum is named in an agreement as a penalty for plaintiff's breach, defendant in claiming the penalty must assign specific breaches of the agreement, so as to advise the other party of the nature of his demand. A general statement that defendant totally disregarded all, and did not fulfill any, of the covenants and stipulations by him to be kept and performed is altogether too general.[3]

§ 449. **Action between principal and agent.**— Where a real-estate agent sues his principal for commissions on account of the sale of realty for the principal, and the petition alleges that he had procured a purchaser ready and able to buy the property on the terms prescribed by the principal, but that the records showed an unsatisfied deed of trust on the property, and that the principal had failed to have it released or canceled, by reason of which fact the sale fell through, this is sufficient; it is not necessary for the plaintiff to allege either that the deed of trust was a lien on the property, or that defendant had refused to make the sale.[4]

§ 450. **Actions between sureties.**— Where a surety brings an action for contribution the petition must contain an averment directly charging that defendant signed as co-surety with himself.[5]

[1] Wood v. Western Union Telegraph Co., 59 App. 236.

[2] State to use v. Wabash, St. L. & P. R. Co., 83 Mo. 144. See also *post*, § 457.

[3] Whitehill v. Shickle, 43 Mo. 537.

[4] Gerhart v. Peck, 42 App. 644. There are many decisions of our courts announcing the principle that the contract of a real-estate agent for the sale of land is complied with when he finds a purchaser ready and able to make the purchase, or to respond in damages in the event of a failure to perform his undertaking. He must, however, procure from such purchaser and tender to the owner a valid written contract containing the terms of the sale, which the owner may enforce by law if necessary, or he must produce such purchaser to the owner ready and able to complete such a contract. If these conditions are fulfilled the agent may recover his commissions even though the sale is eventually not consummated. The leading case on this point is Hayden v. Grillo, 35 App. 647. (The cases are collated in Pattison's Digest, vol. 2, pp. 1402–1407; vol. 5, p. 391.) It necessarily follows that a petition to recover commissions must set forth sufficient facts to show a compliance with the above named conditions.

[5] Leeper v. Paschall, 70 App. 117.

**§ 451. Actions on public securities.**— In an action on a bond issued by a county the petition must show the authority for its issuance.[1] And where the bond was issued to pay a subscription by a county to a railroad company, every essential element of the power given to the county to make such subscription must be stated in the petition.[2] It is not necessary, however, to set forth in detail a compliance with the contract and statute under which the issue was made; and where the act authorizing the bonds to be issued contains a limitation as to the total amount to be issued, if the action is for bonds aggregating in amount less than the limitation, the petition need not contain an allegation that there was not an overissue of the bonds.[3] In any event it would be sufficient to aver that the bonds were duly issued.[3]

**§ 452. Actions against railroad companies.**— Where in an action against a railroad company based upon personal injuries the petition states a case of negligence for which defendant would have been liable, whether plaintiff was a trespasser on the railroad property or an employee of the company, it is not defective because it fails to state what the relation was between plaintiff and the defendant, whether he was an employee or a trespasser, or in what capacity he was present on the property.[4]

**§ 453. Same — Failure to comply with statute or ordinance.** In an action against a railroad company for injuries occasioned by its failing to ring the bell or sound the whistle at a public crossing,[5] the fact of such failure, and some reference to the statute, must be set out in the petition.[6] If the plaintiff seeks to recover for a failure of the company to sound the whistle or to ring the bell at a place used as a crossing, but which was not a public crossing, his petition must contain appropriate averments that it was negligence on the part of the company not to give such signals at such a place.[7] Where there are two counts to the petition, and one alleges a failure to sound the whistle and the other a failure to ring the bell, they are both fatally defective, since in order to recover it must be alleged and proved that

[1] Donaldson v. Butler County, 98 Mo. 163; Catron v. Lafayette County, 106 Mo. 659.

[2] Weil v. Greene County, 69 Mo. 281.

[3] Catron v. Lafayette County, 106 Mo. 659.

[4] Reardon v. Mo. Pac. R. Co., 114 Mo. 384.

As to requisites of a petition based upon the negligence of a railroad company, see also *ante*, §§ 367 and 421–436.

[5] Rev. Stat. 1899, sec. 1102.

[6] Meyer v. Atlantic & Pacific R. Co., 64 Mo. 542.

[7] Gurley v. Mo. Pac. R. Co., 104 Mo. 211.

there was a failure both to sound the whistle and to ring the bell.[1]

§ 454. **Same — Failing to fence.**— A petition under section 1103[2] for double damages must allege that the injury for which the damages are claimed was caused by a failure of the company to erect and maintain fences.[3] It is not necessary that the petition should contain the words wrongfully, negligently, carelessly, or any such words.[4] The petition need not negative the fact that the place at which the animal entered upon the track was within the limits of an incorporated town or city.[5] But a statement filed before a justice of the peace must negative such fact.[6]

§ 455. **Same — Failure to maintain ditches.**— In an action against a railroad company for injury to plaintiff's crops based upon section 1110,[7] which provides that the company shall under certain circumstances construct and maintain suitable ditches and drains, it is essential, in order to make out a *prima facie* case under the statute, to aver, *first*, that the construction of the road-bed obstructed the natural flow of the surface water; *second*, that there were ditches or drains or natural water-courses into which such obstructed surface water could have been conveyed by lateral ditches constructed along the sides of the road-bed; *third*, that the appellant failed to construct such ditches, by reason of which plaintiff's lands were overflowed by the obstructed surface water, and damages ensued.[8] If the petition attempts to set out a cause of action against the company under the statute but fails to do so, it is nevertheless good if it sets out a cause of action at common law.[9]

§ 456. **Same — For setting fires.**— In an action for damage to plaintiff's property arising from fire set by a locomotive of defendant, the petition stated that, while defendant was propelling along and over its railroad a locomotive engine, where the right of way of the railroad extended along, through and adjoining a

[1] Terry v. St. Louis & S. F. R. Co., 89 Mo. 586.

[2] Rev. Stat. 1899.

[3] Luckie v. Chicago & Alton R. Co., 67 Mo. 245.

[4] Mumpower v. Hannibal & St. J. R. Co., 59 Mo. 245.

[5] Meyers v. Union Trust Co., 82 Mo. 237.

[6] Rowland v. St. Louis, I. M. & S. R. Co., 73 Mo. 619; Schulte v. St. Louis, I. M. & S. R. Co., 76 Mo. 324.

[7] Rev. Stat. 1899.

[8] De Lapp v. Kansas City, P. & G. R. Co., 69 App. 572; Graves v. Kansas City, P. & G. R. Co., 69 App. 574. And a prior decision of the supreme court is to the same effect. Field v. Chicago, R. I. & Pac. R. Co., 76 Mo. 614.

[9] Garner v. Hannibal & St. J. R. Co., 34 Mo. 235.

farm owned and cultivated by plaintiff, defendant so carelessly and negligently ran and managed the locomotive that sparks of fire were permitted to escape from it on to plaintiff's farm and on to defendant's right of way, where defendant had carelessly and negligently permitted dry grass, weeds and other combustible matter to accumulate, which was set fire to, and the fire communicated to property belonging to plaintiff on his said farm. It was held that the negligence was charged with sufficient precision, and that the allegations showed clearly the connection between the negligence and the injury sustained by plaintiff.[1]

§ 457. **Same — To recover penalties.**— Where an action is brought against a railroad company to recover the penalty for illegal charges on freight, the petition is sufficient if it charges that plaintiff made a shipment of two carloads over defendant's road, that the legal rates were a specified sum, and that the defendant charged, and plaintiff paid, a different specified sum, being an excess of $3.20 over the legal rates.[2] And the fact that the petition alleges the maximum rate fixed by the statute to be less than it is in fact will not vitiate the petition, though plaintiff would only be entitled to recover the actual excess over the legal rate.[3]

§ 458. **Same — Where road is leased.**— Where one railroad company has leased its road to another, and an action is brought against the lessor company under section 1060,[4] which section provides that a railroad company in this state leasing its road to a company of another state shall remain liable as though it operated the road itself, the petition must aver the fact of the leasing.[5] But in a later decision by the same court it is said that plaintiff may plead the fact according to its legal effect, and may charge that the negligent act was committed by the defendant corporation; and though it turns out on the proof that it was in fact committed by defendant's lessee, this will not affect plaintiff's right to recover.[6]

[1] Palmer v. Mo. Pac. R. Co., 76 Mo. 217.

That the lessor may be held where the fire is set by a lessee, see *post*, § 458, n. 6, this page.

[2] Burkholder v. Union Tr. Co., 82 Mo. 572.

[3] Reynolds v. Chicago & Alton R. Co., 85 Mo. 90.

For requisites of petition in action to recover penalties generally, see §§ 447, 448, *ante*.

[4] Rev. Stat. 1899.

[5] Main v. Hannibal & St. J. R. Co., 18 App. 388.

[6] McCoy v. Kansas City, St. J. & C. B. R. Co., 36 App. 445.

§ 459. **Same — Wrongful appropriation of land.**— In an action to recover damages for the wrongful appropriation by a railroad company of land for railroad purposes, the petition fails to state a cause of action unless it alleges that the entry or the occupation was wrongful.[1] But there need be no charge that the acts were negligently done, even though the ground of the action is the taking and injuring of land outside of the right of way.[2]

§ 460. **Action of replevin.**— It is said in an early decision of the St. Louis court of appeals that under our code the greatest laxity is permitted in the allegations of the petition in this connection, and that some most material facts may be safely omitted from the petition, though they must be contained in the affidavit, which is not traversed by the answer. That the property was not taken under legal process must be stated in the affidavit, though it may be omitted in the petition, and the petition need say nothing as to the value of the property claimed. The common-law rules of pleading do not apply in this form of action, and technical exactness is not required.[3] The supreme court, too, holds that it is not prepared to say that the petition must necessarily allege the value of the property claimed.[4] If no petition is filed, and there is nothing but the statutory affidavit, there is no suit instituted, and the proceedings should be dismissed.[5] For the affidavit is no part of the petition, and cannot be resorted to even to help out the petition.[6]

§ 461. In proceedings in a court of record under the statute as to the claim and delivery of personal property,[7] the petition must state that the plaintiff has a general or special property in the goods sued for. The mere allegation of his right to the possession of them, and of their wrongful caption and detention by defendant, will not suffice.[8] And if the petition fails to comply with this requirement, it will be fatally defective even after verdict.[9] Though if the answer sets out the plaintiff's interest the

[1] Robertson v. Springfield & S. R. Co., 18 App. 185.

[2] McCord v. Doniphan Branch R. Co., 21 App. 92.

[3] Bosse v. Thomas, 3 App. 472, 478.

[4] Schaffer v. Faldwesch, 16 Mo. 337.

[5] Oxley Stave Co. v. Whitson, 34 App. 624.

[6] Benedict Mfg. Co. v. Jones, 60 App. 219.

[7] Rev. Stat. 1899, secs. 4463 *et seq.*

[8] Young v. Glascock, 79 Mo. 574; Deyerle v. Hunt, 50 App. 541; Benedict Mfg. Co. v. Jones, 60 App. 219; Dillard v. McClure, 64 App. 491.

[9] Benedict Mfg. Co. v. Jones, 60 App. 219.

defect will be cured.[1] A petition which states that plaintiff is the owner of, and entitled to the possession of, the property described in it, and that defendant wrongfully detains such property, is sufficient.[2] But the petition must aver that the property was unlawfully detained, otherwise it is fatally defective.[3] A petition which alleged that plaintiff owned and was entitled to the possession of a saw-mill, and that defendant, as sheriff of the county, had wrongfully seized the mill under a writ of attachment against a stranger and closed the operation of it, contains a sufficient allegation of a wrongful taking and detention of the property, at least after verdict.[4] Where replevin is brought for the property of the wife, the petition must set out the wife's interest.[5]

§ 462. **In actions for slander or libel.**— In determining the validity of the petition it will be considered that defendant intended to charge what his language implied. And the court will not make any strained inference in favor of one who thoughtlessly, or else maliciously, touches with flippant lightness upon so sacred a thing as private character.[6] Where the ground of the action is that defendant charged that plaintiff had been guilty of embezzlement, it is not necessary that the petition should set forth the elements of the crime of embezzlement with all the precision and certainty required in an indictment for the offense.[7] If the libel is in the form of a letter or other writing, which imputes to the plaintiff an indictable offense, or which contains language which is for any reason libelous *per se*, it is sufficient to set out the writing in the petition *verbatim*.[8] And it is sufficient to charge that such writing was sent to the plaintiff alone.[9] Where a cause of action for slander is based upon words imputing to a woman the crime of adultery, the petition must contain an averment that plaintiff was at the time a married woman.[10] Where the petition alleged that plaintiff was charged with swear-

[1] Dillard v. McClure, 64 App. 491. The rule seems to be different when the suit is brought before a justice of the peace. Randol v. Buchanan, 61 App. 445.

[2] Martin v. Block, 24 App. 60.

[3] Singer Mfg. Co. v. Senn, 7 App. 584.

[4] Keen v. Munger, 52 App. 660.

[5] Haile v. Palmer, 5 Mo. 403.

[6] McGinnis v. Knapp, 109 Mo. 131. In this case the language set out in the petition was held to clearly impute a charge of bribery, or of knowing that money was to be used for the purpose of bribery.

[7] Wagner v. Saline County Printing Co., 45 App. 6.

[8] Meyrose v. Adams, 12 App. 329; Houston v. Woolley, 37 App. 15.

[9] Houston v. Woolley, 37 App. 15.

[10] Christal v. Craig, 80 App. 367.

ing falsely before a justice, but there was no averment that the justice had jurisdiction or power to administer oaths, or that the testimony was as to a material matter, the petition, though defective, was nevertheless good after verdict.[1]

**§ 463. Same — Further rules.**— In a very early decision in this state it is said that the slanderous words must be stated in the declaration as they were uttered, in order that the defendant may be informed against what charge he must defend himself. But the court added: "It is not, certainly, expected that every word is to be proved exactly as laid in the declaration, but plaintiff must prove such of them as will suffice to sustain his declaration, and it will not suffice to prove equivalent expressions."[2] It is not enough that the words proved are of equivalent meaning; they must be substantially the same words laid in the petition; though if the words charged to have been spoken are proved, but with the omission or addition of others not varying the sense, this is sufficient.[3] It is not necessary that the petition should contain an allegation that the slanderous words were spoken in the presence of any one, or that they were understood by those present.[4] If, however, the words spoken are in a foreign language, then the petition must state that those in whose presence they were spoken understood them.[5] The words must be charged as spoken and in the tongue spoken; and if spoken in a foreign language they must be followed by a proper translation, and it is improper to set out only in the English language words spoken in a foreign language.[6] If the words are correctly translated in the petition, it is immaterial that a witness translates them by using other words of equivalent meaning.[7]

**§ 464. Same — Alleging the damages.**— The test as to the right to recover general damages for libel is, Does the law infer damages as being necessarily occasioned by the publication?[8] In the case cited plaintiff's action was for libel on him in his profes-

[1] Palmer v. Hunt, 8 Mo. 512. But in a case where the objection was made by demurrer to the evidence, the demurrer was sustained. Harris v. Woody, 9 Mo. 113. This subject is, however, fully considered in chapter V. See §§ 90–93.

The question whether a petition in slander or libel should contain only one count, or several counts, is treated in chapter X. See § 220.

[2] Watson v. Musick, 2 Mo. 29.

[3] Noeninger v. Vogt, 88 Mo. 589; Walter v. Hoeffner, 51 App. 46.

[4] Atwinger v. Fellner, 46 Mo. 276.

[5] State v. Matheis, 44 App. 294.

[6] Elfrank v. Seiler, 54 Mo. 135; State v. Marlier, 46 App. 233.

[7] Noeninger v. Vogt, 88 Mo. 589.

[8] Spurlock v. Lombard Ins. Co., 59 App. 225.

sion or trade, he being engaged in the practice of law, in buying and selling of real estate, etc., in building houses, and being also the owner of a hotel. The court says that the question is, Does the publication complained of contain anything that imputes to plaintiff in any one of his numerous qualities, whether as a lawyer, real-estate dealer, farmer, innkeeper, or what not, fraud, dishonesty, or any mean or dishonest trickery in his conduct, insolvency, past, present or future, or want of credit or integrity or of any pecuniary ability to carry on his business with success?[1] So, too, in an action by merchants against a commercial agency for publishing that plaintiffs were insolvent, where the petition charges that the publication is a libel on their good name and credit, and by reason thereof they were forced to suspend business, proof of the loss of trade as an element of damages is competent.[2] Damages for disgrace and mortification suffered as the result of a slander are general, and may be recoverable under a general averment of injury to reputation.[3]

**§ 465. Same — Averring malice.** — If the slanderous words are spoken falsely of the plaintiff, it is unnecessary that the petition should contain an allegation of express malice,[4] for every defamatory publication *prima facie* implies malice.[5] Malice is sufficiently charged if the petition alleges that defendant wrongfully, intentionally and without just cause made the statement, and that such statement is not true; it is not necessary to use the word "maliciously."[6]

**§ 466. Same — The innuendo.** — The office of an *innuendo* is to explain and point out the proper meaning of the words, but not to extend or enlarge such meaning beyond what is warranted by the prefatory matter,[7] unless the words have acquired a local and unaccustomed import; it is not to be employed as a substitute for an averment.[8] Where there has been no *colloquium* or inducement laid, by which the *innuendo* becomes needful as an explanation, and when the words charged are actionable by themselves, the *innuendo* may be rejected.[9] It is not the office of the

[1] A number of cases are cited and commented on in the opinion. 59 App., pp. 230–233.

[2] Mitchell v. Bradstreet, 116 Mo. 226.

[3] Nicholson v. Rogers, 129 Mo. 136. The rules as to stating the damages, and the relief asked, in actions for slander or libel will be found under § 323, *ante*.

[4] Hudson v. Garner, 22 Mo. 423.

[5] Sullivan v. Strathan, 152 Mo. 268.

[6] Linville v. Rhoades, 73 App. 217. See also § 335, *ante*.

[7] Hudson v. Garner, 22 Mo. 423.

[8] Boyce v. Aubuchon, 34 App. 315. And the same principle is recognized in Birch v. Benton, 26 Mo. 153.

[9] Hudson v. Garner, 22 Mo. 423.

*innuendo* to make averments, but to apply the words or explain their meaning.[1] *Innuendoes* are used to so connect the words charged with the averments as to make the petition a logical and complete statement of plaintiff's case.[2]

§ 467. Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an *innuendo* to point out the meaning which the plaintiff claims to be the true meaning of the language, and the meaning upon which he relies to sustain his action. This is so whether the ambiguity be patent or latent, and whether or not any facts are alleged as inducement. The defendant is thus informed of the precise charge he has to meet, and which he has to deny or justify. On the other hand, the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be defeated on the ground of variance or failure of proof. For when plaintiff by his *innuendo* puts a meaning on the language, he is bound by that meaning, although it may destroy his right to maintain the action.[3] The *innuendo* is thus intended to define the defamatory meaning which the plaintiff placed upon the words used. In case the defamatory meaning is apparent from the language charged, there is no necessity for an *innuendo*. Therefore the *innuendo* becomes a part of the cause of action stated.[4]

§ 468. But the rule that the *innuendo* is a part of the cause of action stated in the petition does not obtain when the words charged are actionable in themselves. In such case the defendant can put in issue the truth of the words spoken, either with or without their alleged meaning, and it will then be for the jury to say whether or not the *innuendo* is sustained. If it is not sustained, plaintiff may still fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves without the meaning alleged, and that therefore the unproved *innuendo* may be rejected as surplusage.[5] No *innuendo* is necessary to explain the word "defaulter," when used in a newspaper article charging that plaintiff could not qualify for an elective office because

[1] Bundy v. Hart, 46 Mo. 460; Powell v. Crawford, 107 Mo. 595; Wood v. Hilbish, 23 App. 389.

[2] Legg v. Dunlevy, 80 Mo. 558.

[3] Townshend on Slander and Libel, sec. 338; Hudson v. Garner, 22 Mo. 423.

[4] Callahan v. Ingram, 122 Mo. 355.

[5] Callahan v. Ingram, 122 Mo. 355. And this rule is recognized in a much earlier case. Hudson v. Garner, 22 Mo. 423. In this last case there is a full discussion of the office of the *innuendo*, and many authorities are cited.

he was a defaulter. When that term is employed to explain a disqualification for holding a public office, but one meaning can attach to it in the minds of all persons of ordinary intelligence.[1]

§ 469. Same — The colloquium. — Under the common law, if the words were actionable in themselves, it was not necessary to aver that they were spoken in a conversation of or about plaintiff; but if they had a slanderous meaning, not of their own intrinsic force, but by reason of certain extrinsic facts and circumstances which made them actionable, these facts must have been alleged as an inducement, and then there must have been a *colloquium* averring a speaking of them of and concerning the plaintiff.[2] But section 635[3] provides that in such an action it shall not be necessary to state in the petition any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and unless such allegation is controverted in the answer, it shall not be necessary to prove it on the trial.[4] If the words complained of are not actionable *per se*, the petition must contain statements of extrinsic matter showing that they were actionable,[5] whether the action is one for libel or one for slander.[6] It is not sufficient to make these extrinsic facts appear by *innuendo*, for it is not the office of the *innuendo* to make averments, but to apply the words or explain their meaning.[7] And if the words are in themselves innocent without the explanatory facts, the absence of averments setting forth these explanatory facts cannot be supplied by the *innuendo*.[8] Where the words charged are connected with other facts, such facts must be considered with the charge, and the natural and ordinary signification must be given to the whole matter thus connected. If thus considered a libel is not charged, the case fails; and, on the other hand, if a libel is charged, the case stands, and must be met by the defendant.[9] If a word is used in a sense

[1] State v. Kountz, 12 App. 511.

[2] Palmer v. Hunter, 8 Mo. 512; McManus v. Jackson, 28 Mo. 56; Powell v. Crawford, 107 Mo. 595.

[3] Rev. Stat. 1899.

[4] Stieber v. Wensel, 19 Mo. 513; Caruth v. Richeson, 96 Mo. 186; McManus v. Jackson, 28 Mo. 56.

[5] Curry v. Collins, 37 Mo. 324; Legg v. Dunlevy, 10 App. 461; Wood v. Hilbish, 23 App. 389.

[6] Legg v. Dunlevy, 10 App. 461.

[7] Bundy v. Hart, 46 Mo. 460; Wood v. Hilbish, 23 App. 389.

[8] Salvatelli v. Ghio, 9 App. 155.

[9] Wagner v. Saline County Printing Co., 45 App. 6.

different from its ordinary meaning, there must be an averment to that effect, and it must also be alleged that the hearers understood it in that sense.[1]

§ 470. Where the words complained of do not identify the plaintiff but may apply to another or others exclusively, the petition must allege facts showing that the words referred to the plaintiff and were so understood by the hearers.[2] For if the defamatory matter points to no person in particular, it becomes a question of fact whether it does or does not apply to plaintiff.[3] If the words are not actionable *per se*, and the ground of the complaint is that plaintiff has been injured in respect to his character, reputation or business, he must aver that the words were spoken in reference to one of these, and special damage must be averred and proved.[4] Thus, where the petition charges that words were written of plaintiff charging that he was supervising architect of a certain building, and that he promised to give to defendant's firm a contract for work on such building, provided the sum of $200 was paid to him as commissions, it was held that, in the absence of averments of any extrinsic facts showing that these words had a libelous meaning, the petition was fatally defective.[5] Allegations that in consequence of the publication of a notice of dissolution of a partnership by one not a member of the firm, a general loss of custom had resulted to plaintiffs, and many people were prevented from transacting business with them, and that their commercial and financial standing was reduced, do not render the publication libelous.[6]

§ 471. **Illustrations as to the innuendo and colloquium.**— The words charged in the petition were that plaintiff "swore to a lie," with an averment that defendant meant and was understood to charge plaintiff with the crime of perjury, but without a *colloquium*, and the petition was held bad.[7] There should be proper averments that plaintiff was sworn as a witness in a judicial proceeding and that the speaking of the words had reference to such a proceeding;[8] though the words "you swore to a lie be-

[1] Dyer v. Morris, 4 Mo. 214.

[2] Crecelius v. Bierman, 59 App. 513.

[3] Caruth v. Richeson, 96 Mo. 136.

[4] Curry v. Collins, 37 Mo. 324.

[5] Legg v. Dunlevy, 80 Mo. 558. In that case there was no statement of what are the duties of a supervising architect, nor any allegation by which it was made to appear that those duties are in conflict with his taking commissions from a subcontractor to aid him in making a subcontract on the building he is supervising.

[6] Baldwin v. Walser, 41 App. 243.

[7] Palmer v. Hunter, 8 Mo. 512.

[8] McManus v. Jackson, 28 Mo. 56.

fore the grand jury" are actionable *per se*.[1] Where the slander imputed was in relation to the crime of passing counterfeit money, there must be a *colloquium* that the words were spoken of and concerning the plaintiff's commission of the offense, knowing the money to be counterfeit; and the want of such an allegation is not aided by the *innuendo*.[2] Where the petition contained the words, said of a woman, "she has gone down the river with two whores to a goose horn at St. Louis and is now there with them," it is necessary, in order to make the words actionable, that there should be an *innuendo* as to the kind of a place meant by "goose horn.[3] So, too, the words "I stroked her," without any *innuendo* as to the signification of the word "stroked," are not slanderous.[4] It is to be borne in mind, however, that though the word used is one that, on account of its obscenity, is not defined by lexicographers, it may nevertheless be an English word, the meaning of which is well understood.[5]

§ 472. **Slander of title.**— A cause of action is sometimes denominated slander of title by a sort of figure of speech, in which the title is personified, and made subject to many of the rules applicable to personal slander, when the words themselves are not actionable. It is the special damage that gives the cause of action; and it is essential that the statement should be both false and malicious, that is, that it be made with the intent to injure the plaintiff. Falsehood, malice, and injury to the plaintiff must all be alleged and proved. And the necessity for these allegations does not depend upon the medium through which the slander is conveyed, whether in words, writing or print, because the nature of the action is one for special damage actually sustained, and not an action for slander. The fact that the publication is written or printed, and not oral, makes no difference in the ground of the action, and goes only to the question of dissemination and consequent damage.[6] The action will lie for slander of title to letters patent.[7]

§ 473. **Actions for delinquent taxes.**— In an action to collect delinquent taxes the petition need not set out all the steps required to be taken in order to make the tax a valid one.[8] If the petition does not contain a description of the land sought to be

[1] Perselly v. Bacon, 20 Mo. 330.
[2] Church v. Bridgman, 6 Mo. 190.
[3] Dyer v. Morris, 4 Mo. 214.
[4] Adams v. Hannon, 3 Mo. 222.
[5] Edgar v. McCutchen, 9 Mo. 768.
[6] Meyrose v. Adams, 12 App. 329, 332.
[7] Meyrose v. Adams, 12 App. 329; Linville v. Rhoades, 73 App. 217.
[8] State ex rel. v. Rau, 93 Mo. 126.

charged with the lien of the tax, it is fatally defective even after verdict.[1] If the action is against a railroad company for delinquent taxes, it need not describe the property otherwise than as so many miles of a given value, with a proper proportion of the value of the rolling stock added.[2] There should be an allegation that the land has been returned delinquent or had been forfeited to the state.[3] If the petition avers an assessment by the proper authority in a sum specified, the levy of specific taxes thereon by the duly constituted authorities, the effort of the collector to collect the taxes and his failure to do so, the return of the taxes as delinquent, and the necessity for the action for taxes, penalties, costs and attorney's fees, it is sufficient; it is not necessary to set out the district assessor's valuation for each year, the taxes for which are delinquent, nor is it necessary to allege the doubling of the valuation by the assessor.[4] Where the proceeding is for the purpose of establishing a demand against the estate of a decedent for taxes which have accrued on personalty in the hands of the administrator, the petition should set out the taxes for each of the years in separate counts.[5]

**§ 474. Same — By municipality.**— In an action by a city to recover delinquent taxes, the sufficiency of the petition must be measured by the provisions of the statute.[6] In actions by cities of the second class under section 5639,[7] all that is necessary to aver is the amount of the tax, the rate of interest, and date from which it is claimed, the property upon which the tax is charged as a lien, the name of the owner, and the year or years for which the tax was levied, and that it has not been paid; if the tax sued for is a special tax, the petition must also show the date and title of the ordinance under which it was levied.[8] It is not necessary to allege that the sale had been discontinued, nor that the realty had been bid off by the city, nor that the taxes became delinquent before the date of the act.[9]

**§ 475. Actions on special tax-bills.**— Where an action is brought upon a special tax-bill against the owner of the property, it is sufficient in the first instance to set forth the provisions of the

[1] Vaughan v. Daniels, 98 Mo. 230.

[2] State ex rel. v. Hannibal & St. J. R. Co., 101 Mo. 136.

[3] Wellshear v. Kelley, 69 Mo. 343.

[4] State ex rel. v. Cummings, 151 Mo. 49.

[5] State ex rel. v. Tittmann, 103 Mo. 553.

[6] State ex rel. v. Thompson, 149 Mo. 441.

[7] Rev. Stat. 1899.

[8] St. Joseph v. Kansas City, St. J. & C. B. R. Co., 118 Mo. 671. But see the next succeeding section.

[9] Ibid.

tax-bill, and allege that it was issued to plaintiff by the municipal officers duly authorized to do so, and that defendant is the owner of the land sought to be charged.[1] The contract between the city and the contractor need not be set out.[2] And where the city charter provides that in suing on a special tax-bill it shall be sufficient for plaintiff to plead the making and the issuing of the tax-bill, giving the date and contents thereof, it is not necessary to copy the tax-bill in the petition, but it is sufficient to state the substance of it.[3]

§ 476. A city charter provided that whenever the mayor and city council should order the improvement of a street, its cost should be paid by the property owners, and that when the work should be completed under the authority of an ordinance the city engineer should compute the cost and assess it as a special tax against the property. In an action upon a tax-bill issued for paving a sidewalk, the petition failed to state that the work was done by virtue of an ordinance passed by the mayor and council, and that the city engineer had computed the cost of it, and this omission was held to be a fatal defect.[4] If the charter and the ordinance require that the cost shall be shared by the owners of the adjacent property proportionately to the cost of the whole work, though the petition states that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done in front of and adjoining the lot, and not for the proportionate share of the cost of the whole work, yet if the cost is alleged to have been that chargeable to the specified lot, and it is averred that the amount assessed was the proportionate cost of the work under the act, the petition is sufficient.[5] Where a special tax-bill issued by a city of the third class is sued on by an assignee, he need only allege the making of the bill, its contents and date, its assignment, the filing of it, and that defendant owns the lot against which he seeks to establish the lien. If additional allegations are made, stating facts which show an improper authorization of the work, a demurrer will lie to the petition.[6]

§ 477. **Action for a tort.**—In an action for damages occasioned by lowering the grade of a city street, it was alleged that

[1] Vieths v. Planet P. & F. Co., 64 App. 207.

[2] St. Louis v. Hardy, 35 Mo. 261.

[3] Hunt v. Hopkins, 66 Mo. 98; Buchan v. Broadwell, 88 Mo. 31.

[4] Irvin v. Devors, 65 Mo. 625.

[5] Morley v. Weakley, 86 Mo. 451.

[6] Carthage v. Badgley, 73 App. 123.

the defendant city, wrongfully contriving to injure the plaintiff and deprive him of his property, did the act complained of; and it was held that this sufficiently charged an unjustifiable and wanton injury, and that if the acts were done in the exercise of lawful authority, this was a matter of defense to be set up in the answer.[1]

**§ 478. Actions for trespass.**— It is essential in trespass *de bonis asportatis*, as well as in trover, that plaintiff should allege that he had possession, actual or constructive, of the property at the date of the alleged wrongful interference with it by defendant.[2] In trespass *quare clausum*, the petition is bad if it fails to aver that the plaintiff was ever in possession of the premises; it is not sufficient to allege that he is entitled to the exclusive possession of them.[3] But in such case an averment of ownership by plaintiff is sufficient; it is not then necessary to allege an actual possession, since the owner of lands is presumed to be in possession until the contrary appears.[4] When a party has the legal estate in fee he has the constructive possession, when there is no actual possession in any one else.[5] A petition which states that at the time of the trespass plaintiff was in the exclusive and peaceable possession of the premises, and that he was mining under and in compliance with the terms of a valid lease from a former owner which had not expired, that defendant unlawfully and against plaintiff's will ousted him from the possession of the premises, and thereby deprived him of the beneficial use of the property for the remainder of the term, is sufficient.[6] If the action is brought by an executor and the petition alleges that the testator was the owner of the lands at the time of the trespass, this is, under the rulings of the preceding cases, a sufficient allegation of possession by the testator.[7] In an action for treble damages under section 4572,[8] where the trespass charged is the cutting and carrying away of timber, it is not necessary that the petition should state that the trespass was committed contrary to the form of the statute. But it is necessary to state that the defendant had no interest or right in the timber cut and carried away, and that it was taken from land not his own.[9] The description of the

[1] Hill v. St. Louis, 59 Mo. 412.
[2] Deland v. Vanstone, 26 App. 297.
[3] Garner v. McCullough, 48 Mo. 318.
[4] Bell v. Clark, 30 App. 224.
[5] Renshaw v. Lloyd, 50 Mo. 368; Holladay-Klotz L. & T. Co. v. Moss Tie Co., 79 App. 543.
[6] Robertson v. Cleveland Mineral Land Co., 70 App. 262.
[7] Bell v. Clark, 30 App. 224.
[8] Rev. Stat. 1899.
[9] Hewitt v. Harvey, 46 Mo. 368; Holladay-Klotz Co. v. Moss Tie Co., 79 App. 543.

premises as "a building and premises in block No. 84 of the city of St. Louis" is sufficient.[1]

§ 479. **Trespass for mesne profits.**—In an action for trespass for mesne profits at common law, the right of recovery is based on four things: *first*, title to or possession of the premises; *second*, the expulsion of plaintiff; *third*, the reception of rents or profits by defendant; and *fourth*, a re-entry by plaintiff. Unless the petition states all these essential facts it is fatally defective. And as such action cannot be maintained against a defendant who is in actual possession, if the petition shows that defendant was in possession at the time of the commencement of the action, it is bad.[2]

§ 480. **Action for waste.**—In the case of an action by a reversioner against a dowress, the rule is that, if plaintiff declares as reversioner for an injury done to his reversion, the petition must allege it to have been done to the injury of the reversion, or must state an injury of such a permanent character as to be necessarily injurious to his reversion.[3] If the action is against an administrator by a distributee after final settlement, charging waste and mismanagement of the estate, the petition is fatally defective if it fails to state that there are no creditors, and that the property alleged to have been wasted was not applicable to the payment of debts.[4]

[1] Burt v. Warne, 31 Mo. 296. In connection with this subject see § 447, *ante*, note 4, p. 238.

[2] Young v. Downey, 145 Mo. 261.

[3] Proffit v. Henderson, 20 Mo. 325; Van Hoozer v. Van Hoozer, 18 App. 19.

[4] Foster v. Kenrick, 71 Mo. 422.

## CHAPTER XVI.

### THE RULES APPLICABLE TO BILLS IN EQUITY.


§ 481. Bill for an accounting.
482. Proceeding against shareholders.
483. Bill against legal representative.
484. Bill for an injunction.
486. Bill to correct mistake.
487. Bill to redeem.
488. Bill to set aside deed.
489. Bill to set aside trustee's sale.
490. Bill to set aside fraudulent conveyance.
491. Bill for specific performance.
492. Bill for subrogation.
493. Bill to establish rights under a will.


**§ 481. Bill for an accounting.**— A bill for an accounting between partners must either state or pray for an account.[1] And if the plaintiff himself kept all the partnership accounts, the petition should contain an exhibit of the partnership transactions.[2] A bill to take an account between a mortgagor and mortgagee is fatally defective if it does not allege that defendant as mortgagee went into possession of the land after condition broken, or that he entered into possession of the same under a mortgage sale.[3]

**§ 482. Proceeding against shareholders.**— Where a judgment creditor of a corporation files a bill against the corporation and certain of its stockholders, claiming that the stockholders have not paid in full the amount due on their shares, and seeking to enforce their liability for the unpaid balance, if the bill does not allege that the shares held by the stockholders are assessable, or that some amount is due to the corporation from such shareholders on account of the shares held by them, it fails to state a cause of action. The petition must exclude the idea that the defendant stockholders may have purchased for less than their face value shares which had originally been fully paid.[4]

**§ 483. Bill against legal representative.**— A bill to set aside the final settlement of an administrator must charge that the allowances complained of were procured by fraudulent and false

[1] Pope v. Salsman, 35 Mo. 362.

[2] Scott v. Caruth, 50 Mo. 120.

[3] Tetherow v. Chambers, 74 Mo. 183. See also § 489, *post.*

For requisites of **creditor's bill**, see § 490, *post.*

[4] Blanke v. St. Louis-Sonora Mining Co., 35 App. 186. See also § 490, *post.*

means, unjustly, to the injury of the estate and of the parties interested.[1] Where a bill is filed by a distributee of an estate against an administrator after his final settlement, charging him with waste and mismanagement, it is fatally defective if it fails to state that there are no creditors, and that the property alleged to have been wasted was not applicable to the payment of debts.[2]

§ 484. **Bill for an injunction.**— A general allegation in a bill for an injunction that the threatened damages are irreparable is not sufficient; the averments of the petition must show how and for what reason the damages would be irreparable.[3] Traversable facts must be stated in the bill, which show that plaintiffs cannot have an adequate remedy at law, or that the injury cannot be compensated by an action for damages as such.[4] Where the bill is to enjoin a nuisance, the facts constituting the nuisance should be fully set out, so that the court may see and determine from the allegations of the bill the consequences of the act sought to be enjoined; a mere general averment that results constituting a nuisance will follow from defendant's acts is not sufficient. Thus, when the bill seeks to enjoin the use of a proposed dairy, the bill must contain a statement of the methods in which it is intended to use the dairy.[5] If the bill seeks to prevent threatened damages in cutting timber, it must show whether defendant is in possession, and what title, if any, he claims.[3] Where the owner of property abutting upon a city street seeks to enjoin the city from vacating such street, it is not sufficient to allege that he is the owner of property on the street, but he must allege that his property fronts or abuts on that part of the street which it is proposed to vacate, and that he will suffer a special or peculiar injury, and not merely such inconvenience as is caused to all other persons in the neighborhood.[6]

§ 485. A bill to restrain the collection of taxes on the ground of excessive valuation, which sets forth that the plaintiff, believing all his property to be exempt from taxation, did not deliver any list of property to the assessor, but which contains no aver-

[1] Crowley v. McCrary, 45 App. 350.

[2] Foster v. Kenrick, 71 Mo. 423.

For principles governing bills to set aside fraudulent conveyances, see § 490, *post*.

For a bill in equity by a wife against her husband, see § 391, *ante*.

[3] McKinzie v. Mathews, 59 Mo. 99.

[4] State ex rel. v. Wood, 155 Mo. 425, 447.

[5] McDonough v. Robbens, 60 App. 156.

[6] Glasgow v. St. Louis, 107 Mo. 198; Knapp v. St. Louis, 153 Mo. 560.

ment that the assessor failed to demand a list, states no ground for relief.[1] Where the bill is filed by a taxpayer praying that the disbursement of taxes be enjoined on the ground that they were illegally levied and collected, plaintiff must state the amount of taxes paid by him, so as to show substantial and serious damage, and not a mere technical and inconsequential injury.[2] A bill to enjoin the collection of a judgment must make an exhibit of the transcript of the judgment.[3] If it is sought to restrain the collection of a judgment obtained before a justice of the peace, and to obtain an appeal which plaintiff was prevented from taking by the absence of the justice, the bill must show how much of the judgment is unjust, must set out the facts showing that plaintiff had not a fair trial at law, and must allege that he was not apprised of the intended departure of the justice.[4]

§ 486. **Bill to correct mistake.**— Where one seeks to correct a contract which is claimed to have been erroneously drawn through mistake, he must show in his petition how he is injured by the mistake.[5]

§ 487. **Bill to redeem.**— A petition cannot be sustained as a bill to redeem from a mortgage if it fails to allege that the mortgagee is in possession of the mortgaged premises and has refused to permit the mortgagor to redeem.[6] If a petition to set aside a foreclosure sale and to redeem the property from the debt shows a case in which it is necessary to take an account of rents, taxes, repairs, etc., an offer in the petition to pay whatever shall be found to be due on the property is sufficient; tender before suit is not required, nor need plaintiff bring any money into court until the amount due is ascertained.[7]

§ 488. **Bill to set aside deed.**— Where it is sought to set aside the deed of a person not under guardianship upon the ground that he was insane when he executed it, the petition is fatally defective if it merely charges that the deed is void. There must be averments not only that the maker was insane at the time he

[1] Meyer v. Rosenblatt, 78 Mo. 495.
[2] Robins v. Latham, 134 Mo. 466.
[3] Parsons v. Wilkerson, 10 Mo. 713.
[4] Smith v. D'Lashmutt, 4 Mo. 103.
[5] Stoddard v. Murdock, 37 Mo. 580.
[6] Tetherow v. Chambers, 74 Mo. 183.
[7] Kline v. Vogel, 90 Mo. 239.

The rules governing a petition to foreclose a mortgage will be found in § 415, *ante*, where a bill in equity to foreclose a mortgage is referred to. Bills to set aside a mortgage sale are considered in § 489, *post*.

As to an accounting between mortgagor and mortgagee, consult § 481, *ante*; § 489, *post*. As to redemption from mortgage, see § 487, *post*.

executed the deed, but that the grantee knew that he was insane and took advantage of it. If this last averment cannot be made by reason of the fact that defendant dealt fairly with the insane grantor and without knowledge of his condition, the petition must then aver an ability and willingness on the part of plaintiff to put the defendant *in statu quo*.[1] In a bill filed to set aside a tax deed and the deeds to subsequent purchasers, an allegation that the considerations expressed in the deeds to the subsequent purchasers were wholly false is not sufficient to connect the subsequent purchasers with inadequacy of price in the tax sale, or with notice thereof.[2]

§ 489. **Bill to set aside trustee's sale.**— In a suit to set aside a trustee's sale under a deed of trust the petition must contain an offer by the plaintiff to redeem.[3] In a bill filed by the grantor in a deed of trust against the trustee it was charged that there was an agreement between the parties that if the sale should not bring the amount of the debt the land should be held and sold again by the trustee, and whatever excess above the debt was realized should be paid to the grantor; that the sale was had and the trustee became the purchaser for the benefit of the *cestui que trust;* that the latter afterward deeded the property to the trustee on full payment by the trustee of the secured debt; that the trustee sold part of the land for the full amount of the debt, and yet retained the balance of the land. The bill prayed that the deed be set aside and for an accounting. It was held that the petition did not state a cause of action, because it was not alleged that there was any surplus to which the plaintiff would be entitled. The cause of action as set forth was not that the plaintiff was to be permitted, after the trustee's sale, to find a purchaser for a portion of the land at a price equal to the whole debt, and was then to be given a right of redemption as to the balance.[4]

§ 490. **Bill to set aside fraudulent conveyance.**— Where a purchaser at an execution sale seeks to set aside a prior deed executed by the execution debtor on the ground that such deed was made in fraud of creditors, the petition should contain an averment that the execution debtor had no other land or property subject to execution.[5] He must also allege that he has a

[1] Jamison v. Culligan, 151 Mo. 410.
[2] Walters v. Herman, 99 Mo. 529.
[3] Lipscomb v. New York Life Ins. Co., 138 Mo. 17. Consult § 487, *ante*.
[4] Staples v. Shackleford, 150 Mo. 471.
[5] Bird v. Bolduc, 1 Mo. 701; Page v. Dixon, 59 Mo. 43.

sheriff's deed.[1] In a bill by an attaching creditor to set aside a deed alleged to be fraudulent as to creditors, it is not necessary to aver that the defendants, against whom plaintiff has a general judgment and a judgment and levy in attachment, are insolvent, or that plaintiff has made an effort to collect the judgment by execution, or that he has no remedy at law.[2] If the suit to set aside the fraudulent conveyance is brought by attaching creditors, the petition must show the existence of the facts specified in the statute, which give to attaching creditors a joint right to sue for that purpose, since the right to thus proceed jointly is not allowable at common law or in equity, and is exclusively a statutory right. The chief one of these facts is that the several attachments were levied on the same property.[3] A creditor's bill to subject certain funds to the satisfaction of certain judgments rendered in favor of plaintiff is good, if it charges that M, one of the firm of V and M, on the death of V administered on the partnership estate; that at that time the firm was indebted in a large sum to one L; that M applied all his individual means to the payment of L's debt, and on final distribution of the partnership estate procured an order to pay forty-two per cent. of L's debt out of the firm assets, and, with intent to defraud his creditors and to cover up his property, paid said sum of forty-two per cent. to L; that the previous payments of the same debts by M out of his individual property rendered M insolvent, and that the other member of the firm is insolvent. It is not necessary that the bill should in terms state that L received such sum in order to aid M in defrauding his creditors, now that L had any notice of the intended fraud, since, under the circumstances, the payment to L out of the firm's assets was without consideration, and as to that payment he occupied the position of a volunteer; M being himself largely indebted was bound to pay his own debts before he could use his property to pay the firm debts.[4]

**§ 491. Bill for specific performance.**— In a bill for the specific performance of a contract to convey land, it is not necessary to allege that the contract was in writing.[5] Nor need the plaintiff set out a compliance with each of the conditions precedent to a recovery, as that the cash payment was made or tendered, or that

[1] Hiney v. Thomas, 36 Mo. 377.

[2] Mansur Imp. Co. v. Jones, 143 Mo. 253.

[3] Brumley v. Golden, 27 App. 160.

[4] Lyons v. Murray, 95 Mo. 23.

As to pleading fraud generally, see §§ 151–160, *ante*.

[5] Wildbahn v. Robidoux, 11 Mo. 659; Young Men's Christian Ass'n v. Dubach, 82 Mo. 475.

a deed of trust to secure the deferred payments was executed. But the petition must contain an allegation that plaintiff has performed all of the conditions of the contract to be by him performed.[1]

§ 492. **Bill for subrogation.**— A petition in a proceeding to enforce the right of subrogation must state all matters and facts which give rise to the right claimed.[2]

§ 493. **Bill to establish rights under a will.**— Plaintiffs filed a bill to establish their rights as pretermitted heirs under a will, it not being the object of the bill to set aside the will or attack it in any way, except so far as to establish plaintiff's rights in the estate. Therefore an allegation in the petition that the will was the result of undue influence on the part of one of the defendants is totally irrelevant, and should be stricken out.[3]

[1] Pomeroy v. Fullerton, 113 Mo. 440.

[2] Clark v. First National Bank, 57 App. 277.

[3] Banks v. Galbraith, 149 Mo. 529.

# CHAPTER XVII.

## EXHIBITS.


§ 494. The statutory provisions.
495. To what instruments the rule applies.
496. The construction of the statute.
497. Where the action is founded upon an account.
498. Lost instrument.
499. Not necessary to recite the filing.
500. Effect of failing to file the instrument.
501. How advantage may be taken of the omission.
§ 502. What will excuse a failure to file the instrument.
503. Instrument may be filed at any time before suit is dismissed.
504. Exhibit not a part of the record.
505. Same — In case of tax-bills.
506. But the account is.
507. Illustrations of the foregoing rules.
508. Suit by stockholder.
509. Action on tax-bills.
510. Foreclosure proceedings.
511. Proceedings on judgments.


**§ 494. The statutory provisions.**— When any pleading shall be founded upon an instrument of writing charged to have been executed by the other party, or his testator or intestate, or other person represented by such party, and not therein alleged to be lost or destroyed, such instrument, or a copy of it verified by the party's affidavit, shall be filed with the pleading. If a copy is filed the court may, for good cause shown, require the production of the original before the opposite party is required to plead.[1]

[1] Rev. Stat. 1899, sec. 643. The above section as it now reads has been in force since the revision of 1889, in which revision it was section 2088. Prior to that time the filing of a copy was not allowable, except that it was customary to file a copy when the original had been lost or destroyed, or was already on file in the same or some other court. In the original practice act (Laws 1849, art. VII, sec. 13, p. 82) the provision was that if either party should rely upon any record, deed or other writing, he must file with his pleading an authenticated copy of such record and the original deed or other writing, if in his power; but if he could not produce the writing he must so state in his pleading, together with the reasons therefor, and if the reasons should be sufficient he might file the best evidence in his power of the contents of the writing. In the revision of 1855 the section was changed so as to read substantially as it now reads, except that no provision was made for the filing of a copy. In the revision of 1889 (sec. 2088) the provisions as to filing a verified copy, and giving the court power to order the

Shortly after the adoption of the practice act of 1849 the section in question received a judicial interpretation in the case of *Sexton v. Monks*,[1] in which case it is said that there is no warrant in the new code of practice for the idea that a party cannot use in evidence a paper which has not been filed in the court; that the section applies only to cases in which the party recites his title in his pleading, or to a case in which a record is recited in a pleading as confirming or barring a right. "Take the case of a suit upon a note," says Gamble, J., "in which the defendant answers that before the institution of the suit he paid the debt. The defense in such a case is the fact of payment, and this may be shown by a receipt or by oral evidence. In such cases a receipt, which proves the fact of payment, may undoubtedly be used in evidence whether it was filed or not. The party does not rely on the writing but on the fact of payment." (pp. 161, 162.) The section does not apply to an action for specific performance of a contract in writing to convey land. It applies to actions grounded on instruments in writing which are declared upon as such, and was not intended to abolish the rule of pleading which authorizes a plaintiff to declare upon a contract which at common law was valid though resting in parol, notwithstanding the statute now requires such contract to be in writing.[2] Since it is only where the pleading is actually founded upon the instrument that it is required to be filed, it follows that if a party applies for a writ of *mandamus* to compel the county treasurer to pay the interest coupons on bonds issued by the county, such proceeding not being an action upon the coupons, its object being to obtain an order commanding the treasurer to pay them when presented, it is not a proceeding in which the coupons must be filed as exhibits. And such seems to be the holding of the courts.[3]

§ 495. **To what instruments the rule applies.**— Only such papers need be filed as are executed by the adverse party.[4] If the instrument is signed by both parties it need not be filed.[5] On the same principle articles of association or subscription papers are not required to be filed.[6] If the action is by an in-

production of the original, were inserted in the section, making it read as section 643 now reads.

[1] 16 Mo. 156.

[2] Young Men's Christian Ass'n v. Dubach, 82 Mo. 475. See also § 496, *post*.

[3] State ex rel. v. Craig, 69 Mo. 565.

[4] Campbell v. Wolf, 33 Mo. 459; Carr v. Waldron, 44 Mo. 393; Bowling v. Hax, 55 Mo. 446.

[5] Bowling v. Hax, 55 Mo. 446; Mo. Pac. R. Co. v. Atkinson, 17 App. 484.

[6] Workman v. Campbell, 46 Mo. 305.

dorser against a prior indorser, the note need not be filed.[1] In an action on the bond of an administrator, the settlement made by him showing that he is chargeable with the amount sued for need not be filed with the petition.[2]

**§ 496. The construction of the statute.**— The above section[3] is to have a reasonable construction, and is not to be perverted so as to produce injustice, or to be made to apply to cases which were never intended to be comprehended within it.[4] It does not require a party to file with his pleading all his documentary evidence, nor to set forth every link in his chain of title.[5] Where an action is brought upon a contract which is not alleged to be in writing, if defendant files a general denial and also pleads the statute of frauds, and the plaintiff in his reply avers that the contract was in writing, and files a copy of the writing as an exhibit, the exhibit is properly excluded from evidence, because it was not set out as the foundation of the action.[6] It is sufficient, however, if the exhibit is filed with an amended petition.[7] A failure to file it may be a ground for demurrer;[8] but the instrument itself filed as an exhibit cannot be made the subject of a demurrer.[9] If one party files a copy of the paper as an exhibit, the other party may read it in evidence.[10]

**§ 497. Where the action is founded upon an account.**— It is not necessary for a party to set forth in his pleading the items of an account alleged in it, but if they are not set forth in the pleading itself a copy of the account must be attached to the pleading, and referred to therein, and such copy constitutes a part of the record. If the items of the account are not set forth in the pleading or attached to it, the party cannot give evidence of them.[11] If the pleading does not comply with the above requirement, the other party may either move to have it made more definite, or may object to the introduction of evidence to support it.[12] And in such case the admission of evidence of the account over the objection of the other party is a fatal error.[13] But if de-

[1] Jeffries v. Flint, 55 Mo. 29.

[2] State to use v. Bartlett, 68 Mo. 581.

That a written contract to sell land need not be filed, see next following section.

[3] Rev. Stat. 1899, sec. 643.

[4] Workman v. Campbell, 46 Mo. 305; State to use v. Engelke, 6 App. 356.

[5] Gitt v. Watson, 18 Mo. 274.

[6] Miller v. Grand Grove, 9 App. 585. This decision is not reported in full. Compare § 494, note 2, p. 262.

[7] State ex rel. v. Miller, 16 App. 539.

[8] Dyer v. Murdoch, 38 Mo. 224.

[9] Hall v. Harrison, 21 Mo. 227; Curry v. Lackey, 35 Mo. 389.

[10] Barker v. Patchin, 56 Mo. 241.

[11] Rev. Stat. 1899. sec. 630.

[12] Lawson v. Quillen, 61 App. 672.

[13] Labadie v. Maguire, 6 App. 573.

fendant goes to trial without insisting on having an itemized account, he will be deemed to have waived his right to it.[1] It is sufficient if the above section is substantially complied with, and any lack of particularity will be cured if the opposite party fails to move to have it made more definite and certain.[2] An account is sufficiently itemized if it sets forth the items, though the exact dates are not set opposite each item, where from the nature of the case the dates are given as near as may be.[3] Where the action is for materials furnished and work done without any special contract or separate price for any of the items, a petition stating the time and place, and the particulars of the work and labor, is sufficient, though it does not contain, nor have attached to it, an account stating separately the price or value of each item.[4] If defendant writes upon the back of an account an agreement to assume the payment of it, and the petition is founded upon that agreement, plaintiff need not set forth the items of the account nor attach them to his petition.[5]

§ 498. **Lost instrument.**— If the instrument sued on is lost after the suit is brought, and evidence of its contents is given at the trial without objection, it is immaterial that it was not filed with the petition.[6] If the exhibit has been lost from the files, it is proper to file a duplicate copy.[7]

§ 499. **Not necessary to recite the filing.**— If the instrument on which the pleading is based is in fact filed, it is not necessary that the pleading should contain any statement to that effect; and though the words "herewith filed" are generally used, they are not necessary, and no advantage can be taken of their omission.[8]

§ 500. **Effect of failing to file the instrument.**— If the instrument is not filed, and the reason for not filing it is one other than the statutory one of its loss or destruction, a demurrer will lie;[9] or the suit may be dismissed, even after an answer is filed, as the defect is not waived by failing to raise the objection by demurrer or answer.[10] But it is too late to make the objection

[1] Meyer v. McCabe, 73 Mo. 236.

[2] Meyer v. Chambers, 68 Mo. 626.

[3] Girls' Industrial Home v. Fritchey, 10 App. 344.

[4] Nelson Mfg. Co. v. Mitchel, 38 App. 321.

[5] Meyer v. Lowell, 44 Mo. 328.

[6] State to use v. Smit, 20 App. 50.

[7] Dutro v. Walker, 31 Mo. 516.

[8] Burdsall v. Davies, 58 Mo. 138; Hannibal & St. J. R. Co. v. Knudson, 62 Mo. 569.

[9] Burdsall v. Davies, 58 Mo. 138; Hannibal & St. J. R. Co. v. Knudson, 62 Mo. 569; Hook v. Murdoch, 38 Mo. 224.

[10] Rothwell v. Morgan, 37 Mo. 107. That this does not apply to an account see *ante*, § 497.

after a trial has been had, and no objection was made either by demurrer or answer, or by objecting to evidence at the trial.[1] If the answer admits the execution of the instrument, it is immaterial that it was not filed with the petition.[2]

**§ 501. How advantage may be taken of the omission.**— While a demurrer will lie if a reason is given for failing to file the instrument, and such reason is not the statutory one, yet if there is a failure to file the instrument, but no reason is given for such failure, a demurrer will not lie; the remedy is by motion to dismiss or to require the party to comply with the statute by filing the instrument.[3] In that case advantage cannot be taken of the omission by objecting to the evidence nor by filing a motion in arrest, provided the petition of itself, and without the aid of the exhibit, states facts sufficient to constitute a cause of action.[4] In a proceeding to foreclose a mortgage, if the mortgage filed with the petition shows that it was given to secure certain notes of defendant, but plaintiff does not file such notes with the petition, it is proper for defendant in his answer to set up the fact that the mortgage was given to secure such notes, and then after filing the answer move for a dismissal of the action upon the ground of plaintiff's failure to file them.[5] If the mortgage is given in evidence at the trial, the court is bound to take notice that it was given to secure promissory notes; and if defendant then asks for a dismissal of the case upon the ground that the notes were not filed, the motion should be granted.[6] The failure to file the exhibit is no ground for reversing the judgment; the objection should be raised by motion to dismiss for failure to file it.[7]

**§ 502. What will excuse a failure to file the instrument.**— The provision as to filing a verified copy of the instrument appears for the first time in the revision of 1889.[8] Under the statute in force prior to that time it was held that, where the bond sued on was on file in another court, it was not necessary to file a copy.[9] The fact that the note upon which the action is founded

[1] Burdsall v. Davies, 58 Mo. 138; White v. Stevens, 13 App. 240; Fenwick v. Bowling, 50 App. 516. See, however, next succeeding section.

[2] Cummings v. Kohn, 12 App. 585.

[3] Hannibal & St. J. R. Co. v. Knudson, 62 Mo. 569.

[4] State ex rel. v. Eldridge, 65 Mo. 584.

[5] Pharis v. Surrett, 54 App. 9.

[6] Id.

[7] Rothschild v. Lynch, 76 App. 339.

[8] See *ante*, § 494, n. 1.

[9] State to use v. Engelke, 6 App. 356. In his opinion Hayden, J., says: "The statute has reference to the rule of common-law pleading, which did not require profert or permit oyer when the necessary deed was lost or de-

is held by a third party is no excuse for a failure to file it.[1] If defendant has improperly obtained possession of the note and has detained it and defaced it, he cannot object that it is not filed with the petition.[2] In an action on a policy of insurance plaintiff failed to file the policy with his petition, or to assign any reason for not doing so. Upon defendant filing a motion to dismiss, plaintiff sought to excuse his failure to file the policy on grounds not set up in the petition, namely, that the application signed by plaintiff was a part of the policy, and therefore the instrument actually sued upon was signed by both parties and was not required to be filed. It was held that the motion to dismiss should have been granted, since the court can look only to the petition and the instrument filed with it, and, if the instrument is not filed, it can consider only such reasons for the omission as are shown in the petition itself.[3]

§ 503. **Instrument may be filed at any time before suit is dismissed.**— If a motion is filed to dismiss an action on the ground that the instrument sued on is not filed with the petition, it should be overruled if the instrument is filed during its pendency.[4] And if plaintiff fails to file the exhibit at the time of filing his petition, but does file it a few days before the trial, he may read it in evidence after due proof of its execution.[5]

§ 504. **Exhibit not a part of the record.**— It has been repeatedly held by the courts of this state that an instrument filed with a pleading does not become a part of the pleading, nor is it a part of the record; and the exhibit cannot be considered in determining the sufficiency of the pleading when attacked by a demurrer.[6] The exhibit cannot be used to support the petition on a motion in arrest.[7] Where a note as set forth in the petition

stroyed, but allowed issue to be taken as to the fact alleged as an excuse for not making profert. When the instrument was neither lost nor destroyed, but was in the nature of a record, other rules prevailed; and of a record proper oyer was not demandable" (p. 359). I may add that in the St. Louis courts it has always been customary in such cases to file a certified copy; and, I think, the custom prevails to a considerable extent throughout the state.

[1] Dyer v. Murdoch, 38 Mo. 224.

[2] Bank of Commerce v. Hoeber, 8 App. 171.

[3] McHoney v. German Ins. Co., 37 App. 218. But see opinion on motion for rehearing (p. 220).

[4] Foster v. Atlantic & Pacific R. Co., 1 App. 390; State to use v. Engelke, 6 App. 356.

[5] Rothschild v. Lynch, 76 App. 339.

[6] Among the latest of the cases announcing this rule are Pomeroy v. Fullerton, 113 Mo. 440, and Hickory County v. Fugate, 143 Mo. 71. See also § 502, n. 3, this page.

[7] Bowling v. McFarland, 38 Mo. 465.

called for only simple interest, a judgment for the note with compound interest is erroneous, though the note in fact called for compound interest.[1] The instrument filed with the pleading cannot be made the subject of demurrer,[2] though a failure to file it may be a ground of demurrer.[3]

**§ 505. Same — In case of tax-bills.**— Section 9303[4] provides that in actions upon tax-bills brought in the name of the state at the relation of the collector, certain facts shall be set forth in the tax-bill sued on, which tax-bill shall be duly authenticated by the certificate of the collector and filed with the petition. But this provision does not make the tax-bill a part of the petition, and it is to be regarded as a matter of evidence and not of pleading.[5] It is the petition and not the tax-bill which contains the cause of action, and a motion to dismiss because of alleged defects in the tax-bill should be overruled, though defects in the tax-bill would be a good reason for rejecting it as evidence.[6] If the petition contains no description of the land sought to be affected by the tax-bill, though the tax-bill filed with the petition does contain such description, the judgment is void and open to collateral attack. And of course the objection to it is good upon demurrer and in arrest of judgment.[7]

**§ 506. But the account is a part of the record.**— An account set forth in conformity with section 630,[8] or attached to the pleading, is by the express terms of the statute made a part of the record.[9]

**§ 507. Illustrations of the foregoing rules.**— In a bill filed for a partnership settlement, where the plaintiff kept all the accounts of the partnership, the petition must contain an exhibit of the partnership transactions.[10] If the action is based on a note which is filed with the petition, the fact that an account composed of various items constituted the consideration for the note, and that the note was payable only to the extent of such account, does not render it necessary to file the account with the petition or set it forth therein.[11] Thus, where the note bore the

[1] Poulson v. Collier, 18 App. 583.

[2] Hall v. Harrison, 21 Mo. 227; Curry v. Lackey, 35 Mo. 389.

[3] Dyer v. Murdoch, 38 Mo. 224.

[4] Rev. Stat. 1899.

[5] Vaughan v. Daniels, 98 Mo. 230.

[6] State ex rel. v. Rau, 93 Mo. 126.

[7] Vaughan v. Daniels, 98 Mo. 230. See also § 509, *post*.

[8] Rev. Stat. 1899.

[9] Hassett v. Rust, 64 Mo. 325; Connor v. Heman, 44 App. 346; Coombs Com. Co. v. Block, 130 Mo. 668.

[10] Scott v. Caruth, 50 Mo. 120. In this case the term "exhibit" is not used in its technical sense, but is equivalent to "statement."

[11] Low v. Taylor, 41 App. 517. This principle is also recognized in Meyer v. Lowell, 44 Mo. 328.

following indorsement: "This note is made for the purpose of obtaining credit, and is held as security for any overdraft, and payable only to the extent of such overdraft," it is not necessary to file with the petition an account showing the items of the overdraft.[1] An action was brought for the price of certain articles manufactured for defendant, some of which defendant had ordered in writing and the others verbally, and an itemized account of the whole was filed with the petition. It was held that this was not a suit founded upon an instrument of writing, and it was not necessary that the written orders should be filed with the petition.[2]

§ 508. **Suit by stockholder.**— Where a stockholder of a building and loan association files a bill against the directors of the corporation to restrain them from closing out a series of shares before their maturity, he need not file his certificate of stock or a copy of it.[3]

§ 509. **Action on tax-bills.**— Where the law required the county clerk to issue certificates showing the amount of taxes due from a railroad company to the county, it is not necessary in an action to recover the tax-bills issued against such railroad company to file such certificates, since they are only evidence of the assessment and levy of the taxes, and are not the foundation of the suit.[4]

§ 510. **Foreclosure proceeding.**— If in a proceeding to foreclose a mortgage the plaintiff fails to file with his petition the secured notes, the bill should be dismissed, though the mortgage itself is filed.[5] If the defendant fails to avail himself of the omission by filing his motion to dismiss on that account, he is nevertheless entitled to the production of the notes at the trial, and a decree of foreclosure should not be rendered unless they are produced, or their absence is properly accounted for.[6]

§ 511. **Proceedings on judgments.**— Where a bill is filed to enjoin the collection of a judgment, the transcript of the judgment must be filed as an exhibit.[7] But where an action is brought on a foreign judgment, the record of such judgment need not be filed.[8]

[1] Low v. Taylor, 41 App. 517.

[2] Kingsland Mfg. Co. v. St. Louis Malleable Iron Co., 21 App. 526.

[3] Fisher v. Patton, 134 Mo. 32.

[4] Kansas City v. Hannibal & St. J. R. Co., 81 Mo. 285. See § 505, *ante*.

[5] Pharis v. Surrett, 54 App. 9.

[6] Id.

[7] Parsons v. Wilkerson, 10 Mo. 713. The court of appeals declines to follow this decision, though the point was urged by appellant. Smith v. Taylor, 78 App. 630.

[8] Omahundro v. Clarkson, 13 App. 583.

## CHAPTER XVIII.

### DEFENDANT'S PLEADINGS.


§ 512. He must either demur or answer.
513. Waiver by failure to demur or answer.
§ 514. Same — Misjoinder of parties or causes.
515. Same — Capacity or character of plaintiff.


**§ 512. He must either demur or answer.**— The only pleading on the part of the defendant is either a demurrer or an answer.[1] Most of the questions arising on this section of the statute and those immediately succeeding it will be discussed in the chapters on The Answer[2] and in that on The Demurrer.[3] I shall here only briefly indicate one or two important points connected with pleading by the defendant. Under the common law a demurrer was not generally regarded as strictly a pleading, but rather as an excuse for not pleading. But it is by the above section recognized and classed as a pleading under the code system.[4] A party cannot at the same time raise an issue of law and one of fact going to the entire pleading of the adverse party; by raising the issue of fact he waives that of law.[5] Therefore a defendant cannot at the same time answer the entire petition and demur to it for a misjoinder of parties.[6] If a demurrer is filed and not disposed of, and an answer is afterwards filed and the cause goes to trial, this amounts to a waiver of the demurrer.[7] Where an answer and a motion to dismiss are filed at the same time, the answer will be held to waive the motion to dismiss.[8]

**§ 513. Waiver by failure to demur or answer.**— If any of the matters enumerated in section 598[9] as grounds of a demurrer do not appear upon the face of the petition, objection may be

[1] Rev. Stat. 1899, sec. 596. Notwithstanding the positive terms of the statute, there are certain motions open to the defendant, which, while perhaps not strictly pleadings, yet take the place of a demurrer and operate to suspend the necessity of answering. (Consult chs. XXXI, XXXII and XXXVI.)

[2] Chs. XIX, XX and XXIII.

[3] Ch. XXXII.

[4] Barton v. Martin, 54 App. 134.

[5] Taber v. Wilson, 34 App. 89.

[6] Donahue v. Bragg, 49 App. 273.

[7] Dunklin County v. Clark, 51 Mo. 60.

[8] Hite v. Hunton, 20 Mo. 286.

[9] Rev. Stat. 1899.

taken by answer; but if not taken either by demurrer or answer such objections are waived, except the objection to the jurisdiction of the court over the subject-matter, and the objection that the pleading does not state facts sufficient to constitute a cause of action or defense.[1] All objections to merely formal defects are waived by pleading to the merits and are cured by verdict.[2] The objection that the petition does not state facts sufficient to constitute a cause of action is not waived by a failure to raise it by demurrer or answer; it may be raised at the trial by an objection to the introduction of all evidence, or it may be made in the motion for a new trial,[3] and may even be raised for the first time in the appellate court.[4] But an objection made for the first time at the trial that the petition does not state a cause of action will not be sustained, unless the petition is so fatally defective that a motion in arrest would lie.[5] If the petition, however inartificially drawn, do but state a cause of action, and no objection is taken to the formal sufficiency of its allegations either by demurrer or answer, all such objections will be considered waived.[6] Defendant waives the objection that the contract sued on is within the statute of frauds, if he fails to make it by demurrer or answer.[7]

§ 514. **Same — Misjoinder of parties or causes.** — The objection to a misjoinder or non-joinder of parties is waived unless taken by demurrer or answer.[8] If it is claimed that there are other persons who should have been joined as plaintiffs, defendant must raise the point by demurrer or answer.[9] So, too, if parties are improperly made defendants.[10] A misjoinder of causes of action is likewise waived unless taken advantage of by demurrer or answer.[11] And so is the objection that there is both a misjoinder of parties plaintiff and of causes of action.[12] Where two causes of action are united in the same petition, one against one of the defendants and the other against the remaining defendants, thus making the petition multifarious, the objection cannot

[1] Rev. Stat. 1899, sec. 602 with sec. 609; Dobson v. Winner, 26 App. 329. See note 1 on preceding page.

[2] Nicholson v. Golden, 27 App. 132; Ryors v. Pryor, 31 App. 555.

[3] Andrews v. Lynch, 27 Mo. 167; Syme v. Steamboat Indiana, 28 Mo. 335; Ivory v. Carlin, 30 Mo. 142.

[4] Pelz v. Eichele, 62 Mo. 171; Wilson v. Hart, 98 Mo. 618.

[5] Sackman v. Sackman, 143 Mo. 576.

[6] Pomeroy v. Benton, 57 Mo. 531.

[7] Donaldson v. Newman, 9 App. 235.

[8] Leucke v. Tredway, 45 App. 507; Crenshaw v. Ullman, 113 Mo. 633.

[9] Pike v. Martindale, 91 Mo. 268.

[10] Lyne v. Marcus, 1 Mo. 410.

[11] Hoyle v. Farquharson, 80 Mo. 377.

[12] Anderson v. McPike, 41 App. 328; Rothschild v. Lynch, 76 App. 339.

be taken by a motion in arrest, but must be raised by demurrer or answer.[1] The objection that a cause of action *ex delicto* is joined with one *ex contractu* must be raised in the same manner.[2] But it is held by the supreme court that such a misjoinder is not waived if the point is raised before verdict; if a motion is made at the close of plaintiff's evidence to compel him to elect, it is not too late.[3]

**§ 515. Same — Capacity or character of plaintiff.** — If no question is raised either by demurrer or answer as to the capacity of plaintiff to maintain the action, the question is waived.[4] So is the objection that the petition fails to aver the representative character of plaintiff;[5] and the defect that an infant sues without the appointment of a next friend.[6] And the same rule applies to a curator.[7]

[1] Mead v. Brown, 65 Mo. 552.

[2] Sumner v. Tuck, 10 App. 269.

[3] Southworth Company v. Lamb, 82 Mo. 242. The ground of this decision is that such a motion amounts to a demurrer.

[4] Graham v. Allison, 24 App. 516; Benne v. Schnecke, 100 Mo. 250.

[5] Fuggle v. Hobbs, 42 Mo. 537.

[6] Jones v. Steele, 36 Mo. 324; Rogers v. Marsh, 73 Mo. 64; Taylor v. Pullen, 152 Mo. 434.

[7] Reynolds' Appeal, 70 App. 576.

The question what objections must be taken by demurrer, and what are waived by answering over, is fully discussed in the chapter on The Demurrer (ch. XXXII).

# CHAPTER XIX.

## THE ANSWER.


§ 516. Entitling.
517. When an answer is required.
518. Answer or demurrer.
519. Where there are several defendants.
520. One defendant seeking relief against another.
521. Requisites of answer.
522. Sufficiency of answer.
523. What averments are to be traversed.
524. Answer to amended petition.
525. Supplemental answer.
§ 526. Several defenses.
527. Must be consistent with each other.
528. Decisions illustrating the rule as to consistent defenses.
529. Same—The defense of payment joined with other defenses.
530. Further illustrations of the rule as to consistent defenses.
536. Equitable defenses.
537. Same — Decisions illustrating the doctrine.


§ 516. **Entitling.**— It is not necessary that the answer should be entitled;[1] nor need the venue be stated.[2]

§ 517. **When answer is required.**— A pleading of any kind or a motion to strike out is deemed responsive to the adverse pleading or so much thereof as the pleading or motion is intended to apply to, until otherwise determined by the court.[3] Several pleadings cannot be applied to the same part of the pleading at the same time.[4] A motion going to the merits of the petition will dispense with the necessity of answering until such motion is disposed of, unless the motion is clearly frivolous.[5] But only such motions as go to the merits dispense with the necessity of answering; therefore the pendency of a motion for security for costs will not prevent a judgment for want of an answer.[6] After a judgment by default has been rendered, it is irregular to allow defendant to plead until such default has been set aside.[7]

[1] Mattingby v. Cline, 7 Mo. 499.

[2] Rev. Stat. 1899, sec. 620.

[3] Rev. Stat. 1899, sec. 625. This must be taken in connection with section 596, which provides that the only pleading on the part of the defendant is a demurrer or an answer. For a fuller consideration of motions which take the place of a demurrer, or which suspend the necessity of answering, consult chapters XXXI, XXXII and XXXVI.

[4] Rev. Stat. 1899, sec. 625.

[5] Hill v. Meyer, 47 Mo. 585.

[6] Fears v. Riley, 148 Mo. 49.

[7] Hickman v. Barnes, 1 Mo. 156. The

**§ 518. Answer or demurrer.**— Defendant may demur to one part of the petition and answer to another, though he cannot do both at the same time in the same pleading.[1] Section 598[2] provides that the defendant may demur to the petition when the defects mentioned in the section appear upon the face of the petition. Section 602[2] provides that when any of the defects specified in section 598 do not appear upon the face of the petition, the objection may be taken by answer, but unless taken by demurrer or answer such defects will be waived. In interpreting these two sections it is held that while section 598 will permit a demurrer to a petition where the want of jurisdiction appears upon its face,[3] it does not require the question to be raised in that manner exclusively. It is said that such a construction of the two sections is narrower and more stringent than the courts of Missouri have ever placed upon them, and that the question may be raised by answer, even though the want of jurisdiction does appear upon the face of the petition.[4] If an answer is filed, but the case afterwards goes off on a demurrer without any notice being taken of the answer, this amounts to a withdrawal of the answer.[5]

**§ 519. Where there are several defendants.**— If two or more defendants make the same defense they must answer jointly.[6] In a case where there were several defendants, the answer of one defendant, which was a general denial, was improperly stricken out; but it was held that the error was immaterial, if the general denial of another defendant remained on file, and the whole case was tried upon the issues made by the answers.[7]

**§ 520. One defendant seeking relief against another.**—Where one defendant seeks affirmative relief against a co-defendant, it has been held that it is not necessary to issue new process against such co-defendant, but the same time ought to be allowed such co-defendant to answer as to the relief sought as is given for answering the original petition.[8]

statutory provisions as to the time for filing answers and other pleadings are considered in chapter III. See § 45 *et seq.*

[1] Taber v. Wilson, 34 App. 89. See note 2 on preceding page.

[2] Rev. Stat. 1899.

[3] See first subdivision of the section.

[4] Johnson v. Detrick, 152 Mo. 243.

[5] Dunklin County v. Clark, 51 Mo. 60.

[6] Rev. Stat. 1899, sec. 606.

[7] O'Brien v. Hanson, 9 App. 545.

[8] Tucker v. St. Louis Life Ins. Co., 63 Mo. 588. For a discussion of the circumstances under which one defendant may obtain relief against another, see ch. II, §§ 30–33.

§ 521. **Requisites of answer.** — The statute provides that the answer shall contain, first, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim in ordinary and concise language without repetition.[2] But one answer is allowable, and that must contain all the defenses the party has, no matter what their nature, whether in abatement or in bar.[3]

§ 522. **Sufficiency of answer.** — The answer is sufficient if it is reasonably explicit, and fully apprises the opposite party of the objection made.[4] If the matters set forth in the answer are such that, if true, they present no defense to the action, the answer is in effect no answer, and may be stricken out.[5] It is not essential that any particular fact averred in the answer should either by itself, or when taken in connection with the other averments of the answer, state a defense to the action at law, or even should constitute an equitable defense, provided that it avers a fact which it is proper for the court to consider, together with other circumstances, in determining whether or not the relief prayed by plaintiff, or any part of such relief, should be granted or refused.[6] The central idea of code pleading is that the answer shall not be evasive, but shall meet the allegations of the petition fairly and squarely, and present sharply-defined issues to be passed upon by the triers of the facts. Plaintiff is not to be compelled to carefully sift each denial of the answer, and to carefully compare it with each paragraph of the petition, in order to see what is admitted and what is denied. And whether the denial is general or special, it must be such that the issue is not left to surmise or conjecture.[7] An answer which neither admits nor denies the making of the contract set up in the petition is evasive and may be stricken out.[8] Where two covenants are in-

[1] Since the same principles govern, and the same rules are applicable to both an answer to a petition and a reply to the new matter set up in the answer. I shall, under the head of Requisites of a Good Answer, cite a number of cases which, strictly speaking, involve the traverse of new matter contained in an answer.

[2] Rev. Stat. 1899, sec. 604. The subject of the denial is treated of in ch. XX; the subject of counter-claim in ch. XXIV.

[3] State ex rel. v. Vallins, 140 Mo. 523. Consult, in this connection, ch. XXVII.

[4] Fassett v. Fassett, 41 Mo. 516.

[5] North v. Nelson, 21 Mo. 360.

[6] Ridgeway v. Herbert, 150 Mo. 606.

[7] Snyder v. Free, 114 Mo. 360.

[8] Miller v. Chicago & Alton R. Co., 62 App. 252.

dependent, and have no reference to each other, the averment of the performance of one of them, where the action is based upon the other, will be considered immaterial, and an answer denying the performance of the immaterial covenant is demurrable.[1]

**§ 523. What averments are to be traversed.**— Defendant is bound to plead only to the substantive facts alleged in the petition and not to mere matters of evidence.[2] But the petition may be so shaped as to make that material and necessary to be traversed which otherwise would not be.[3] Defendant cannot avail himself at the trial of a defense which he has not pleaded.[4] But the fact that an answer is drawn too broadly does not require the defendant to offer proof as broad as the allegations of the answer. It is sufficient if he proves enough of the facts pleaded to constitute a good defense to the cause of action stated in the petition.[5] While the existence of jurisdiction may be pleaded in general terms,[6] yet where it is intended by answer to raise the question of the jurisdiction of a court or officer, it is not sufficient to allege that the court or officer did not have jurisdiction, or that the summons or service was defective; the pleading must set out the facts showing the lack of jurisdiction and the insufficiency of the summons or service.[7]

**§ 524. Answer to amended petition.**— Where an amended petition is filed which does not change the issues, and which does not attempt to charge defendant in any other capacity than that in which he was charged in the original petition, there is no necessity for filing an additional answer; if the original answer is on file and raises an issue, no default can be taken.[8]

**§ 525. Supplemental answer.**— The filing of a supplemental answer constitutes the abandonment of any and all previous answers.[9]

**§ 526. Several defenses.**— The defendant may set forth in his answer as many defenses and counter-claims as he may have, whether they are such as are denominated legal or equitable, or both; they must each be separately stated in such manner that they

[1] Simonds v. Beauchamp, 1 Mo. 589; Brand v. Vanderpool, 8 Mo. 507.

[2] Edmunds v. St. Louis R. Co., 3 App. 603.

[3] Kansas City Hotel Co. v. Sauer, 65 Mo. 279.

[4] Russell v. Whitely, 59 Mo. 196.

[5] Frederick v. Allgaier, 88 Mo. 598.

[6] See Rev. Stat. 1893, sec. 634.

[7] Hopkins v. Huff, 67 App. 394. As to traversing averment of value, see § 542, *post*.

[8] Bremen Bank v. Umrath, 55 App. 43.

[9] Kortzendorfer v. St. Louis, 52 Mo. 204; Rubelman v. McNichol, 13 App. 584. See also ch. XXX.

may be intelligibly distinguished, and must refer to the cause of action which they are intended to answer.[1] The only limitation upon the number of defenses which may be set up in the answer is that they must be consistent with each other.[2] The various answers must be separately and distinctly pleaded.[3]

§ 527. **Must be consistent with each other.**— It is a rule of universal application that where distinct and separate defenses are included in the same answer they must be consistent with each other.[4] And the test whether defenses are or are not consistent is whether the proof of one necessarily disproves the other.[5] For the defenses are not inconsistent if both may be true.[6]

§ 528. **Decisions illustrating the rule as to consistent defenses.**— During the time when the statute required all pleadings to be verified[7] it was held that a denial of an alleged slander and a plea of justification were inconsistent, and could not be pleaded in the same answer. Judge Scott says: "The object of the present practice act was to introduce truth and simplicity in pleadings. The act requires that the pleadings shall be verified by affidavit. This requirement must necessarily exclude inconsistent answers. As an answer in justification of a charge for slander must admit the speaking of the slanderous words, the defendant cannot deny and justify the speaking of the words at the same time. Under the old system the speaking of the slanderous words might be denied in one plea and justified in another, but that cannot now be permitted. What were consistent or inconsistent pleas under the old practice, where the pleadings were not required to be verified, is a very different question from what are consistent or inconsistent answers under the practice now prevailing, where all the pleadings are required to be sworn to."[8] But in *Wood v. Hilbish*[9] it is said: "Under our code the defendant in an action for slander may in his answer deny the speaking of the words and also justify; the denial and the justification are not inconsistent. Proof of one does not disprove the other;

[1] Rev. Stat. 1899, sec. 605.

[2] Crowder v. Searcy, 103 Mo. 97; Stottlemeyer v. Bobb, 7 App. 578.

[3] Stottlemeyer v. Bobb, 7 App. 578. In chapter XX (§ 549) the question is considered what defenses may be joined with a general denial.

[4] Atteberry v. Powell, 29 Mo. 429; Crowder v. Searcy, 103 Mo. 97.

[5] Nelson v. Brodhack, 44 Mo. 596; Patrick v. Boonville Gas Light Co., 17 App. 462; McCormick v. Kaye, 41 Mo. 263; Nelson v. Wallace, 48 App. 193; Cox v. Bishop, 55 App. 135.

[6] Grier Commission Co. v. Dockstader, 47 App. 42.

[7] See Rev. Stat. 1855, p. 1234, sec. 20.

[8] Atteberry v. Powell, 29 Mo. 429, 432.

[9] 23 App. 389.

proving the truth of the words spoken does not prove the speaking of the words." (p. 397.) And the same view is taken in *Nelson v. Wallace*.[1] If in an action for slander the answer contains a plea in mitigation of damages, it should not also contain an averment of the truth of the alleged slanderous words, since the defenses are inconsistent; a plea of the truth is either a complete defense to the action or its result is an aggravation of the damages.[2]

§ 529. **Same — The defense of payment joined with other defenses.**— In a case decided by the supreme court in 1865, it was held that defendant, when sued on a note, will not be permitted to deny the execution of the note and in the same answer allege payment, because the defenses are inconsistent.[3] In 1888 a case involving an action on a note came before the St. Louis court of appeals.[4] There the answer admitted the execution of the note, but denied that plaintiff was the owner of it, and at the same time alleged payment. The court of appeals decided that the plea of payment was not inconsistent with the denial of plaintiff's ownership, since defendant may have paid the note to the true owner. Apparently this is all that was involved in that case, and was sufficient to warrant the affirmance of the judgment. But the court went further, and said that, under the decision in *Nelson v. Brodhack*,[5] pleas of *non est factum* and of payment are admissible as consistent pleas in the same answer.[6] But the decision of the supreme court there cited did not, any more than the case in the court of appeals itself, involve the point in question. The action in the case of *Nelson v. Brodhack*[5] was one in ejectment. The answer was a general denial and a plea of the statute of limitations; and the question was whether the pleas were inconsistent. In deciding that they were not inconsistent, the supreme court *arguendo* illustrates the point by saying: "A special defense is not necessarily inconsistent with a denial. For instance, suppose A sues B upon a promissory note; B denies its execution, in the nature of a special *non est factum* under the old system, and afterwards alleges payment

[1] 48 App. 193. In neither of these cases is the above cited supreme court decision noticed. But as that decision is apparently based solely upon the requirement that the answer be verified, and as verification is no longer required, the two court of appeals decisions probably state the true rule, a rule which is even more consonant with the theory of the Code than with that of the common law.

[2] Coe v. Griggs, 76 Mo. 619.

[3] Sheppard v. Starrett, 35 Mo. 367.

[4] Cavitt v. Tharp, 30 App. 131.

[5] 44 Mo. 596.

[6] Cavitt v. Tharp, 30 App. 131, 134.

or release. He does not thereby deny the existence of the paper; and an averment of payment or any other matter of discharge is not necessarily inconsistent in fact with original non-liability, for men sometimes adjust demands for which they are not liable.[1] The court of appeals, in deciding the above case of *Cavitt v. Tharp*[2] makes no reference to *Sheppard v. Starrett.*[3] Nor does it mention *May v. Burk*,[4] though the latter case, by inference at least, affirms the former decision of the supreme court. The language of this last decision is as follows: "The plaintiffs demurred to the answer, because, as alleged, it did not state a defense to the action, and that the answer is inconsistent in its various defenses, citing as authority *Sheppard v. Starrett.*[3] In that case it was held that in a suit on a note, the defense of *non est factum* and payment are inconsistent and not permissible. But there is no such question presented here. In the case at bar the defendant pleads *non est factum* as to the instrument sued on, and payment of another debt on a different note." And the court holds that those defenses are not inconsistent.[5] An administrator *de bonis non* brought an action to recover the balance of a deposit which decedent had made with the defendant. The answer set up, *first*, payment of the entire amount deposited to the former administrator in his representative capacity, and a subsequent deposit by him of such amount to his individual account; *second*, payment in divers sums amounting in the aggregate to the amount deposited upon the order of the former administrator in his representative capacity. It was held that these defenses were inconsistent, and that defendant was properly required to elect on which defense he would stand.[6]

**§ 530. Further illustrations of the rule as to consistent defenses.**— In an action in which defendant claims no rights as against the plaintiff under the contract sued on, he may set up both its illegality and its performance.[7] Where the action is on a written contract, and the answer contains, *first*, a duly-verified denial of the execution of the writing, and, *secondly*, alleges that the contract was not performed by plaintiff in accordance with its terms, the answer taken as a whole does not constitute an

[1] 44 Mo., p. 598.
[2] 30 App. 131.
[3] 35 Mo. 367.
[4] 80 Mo. 675.
[5] 80 Mo., p. 679. The same court of appeals has decided that in an action upon a note the answer may deny its execution and also set up the statute of limitations. Schuchman v. Heath, 38 App. 280. Consult, also, § 549, *post.*
[6] Smith v. Culligan, 74 Mo. 387.
[7] Lee v. Dodd, 20 App. 271.

admission of the execution of the instrument.[1] In a case involving a defense to an action upon a policy of insurance there was a plea of *non est factum*, which was followed by a further defense that one of the conditions of the policy had been violated. While the question of the consistency of these defenses was not raised in the case, the court expressed a doubt whether the two defenses were consistent.[2]

§ 531. Where in an action on a note the answer alleges that there has been a compromise and release of the note, and that plaintiff had executed a written release to defendant, it seems that a reply denying that the note in suit had any connection with the release, and at the same time alleging that the release was procured by fraud, sets up inconsistent defenses to the answer.[3] . In an action of ejectment, brought by the heirs against the purchaser at an administrator's sale which was void for informality, the defendant may set up the statute of limitations, and at the same time may plead that the purchase-money and taxes paid by him were for the benefit of the plaintiffs, and should in equity and good conscience be refunded to him.[4] Where a suit is brought to enforce a contract for the purchase of land, the vendee cannot plead the statute of limitations, which would rescind the contract and leave the title in plaintiff, and at the same time insist on having the contract performed by a delivery to him of a deed from the plaintiff.[5]

§ 532. A defendant cannot rely on a former judgment as *res adjudicata* of the matter in issue, and at the same time insist that such former judgment was void.[6] A purchaser at an executor's sale cannot at the same time claim under the sale and also plead that the sale was not made in accordance with the order of the court.[5] The allegations that a mortgage was satisfied and that, notwithstanding the satisfaction, the property was sold under it and bid in by the mortgagee are not inconsistent.[7]

§ 533. In an action for the purchase price of a machine, a defense of breach of warranty and a defense that the machine was worthless for the purpose for which it was purchased are consistent defenses, and may be set up in the same answer.[8] And

[1] Cox v. Bishop, 55 App. 135.

[2] Grady v. American Central Ins. Co., 60 Mo. 116.

[3] Dalrymple v. Craig, 76 App. 117.

[4] Schaefer v. Causey, 8 App. 142, affirmed by the supreme court, 76 Mo. 365.

[5] Adair v. Adair, 78 Mo. 630.

[6] Sheehan & Loler Trans. Co. v. Sims, 36 App. 224.

[7] Thornton v. Irwin, 43 Mo. 153.

[8] Keystone Implement Co. v. Leonard, 40 App. 478.

the court adds that the second defense was valid as showing a failure of consideration, and this whether the defendant offered to return the machine or not, or failed to notify plaintiff of its worthlessness. That case was decided by the Kansas City court of appeals; but it does not entirely meet the approval of the St. Louis court of appeals. The latter court intimates that the decision may be upheld on the ground that the answer did in fact contain an offer to return the machine, but it holds that without such an offer the defense would not be good and that the two defenses are inconsistent.[1]

§ 534. Defendant in an action for assault and battery may set up the three defenses of, first, a general denial; second, *son assault demesne;* and third, *mollitur manus imposuit.*[2]

§ 535. In an action to enforce a mechanic's lien brought against the owner and contractor, the owner denied any knowledge that plaintiff had delivered the materials alleged, and denied that he gave any notice of his lien; he also set up as a counter-claim that the plaintiff had guaranteed that the contractor should build the house in a workmanlike manner and finish it by a certain date, that neither guaranty had been fulfilled, and claimed damages for the breach. It was held that these defenses were not inconsistent.[3]

§ 536. **Equitable defenses.**— An equitable defense may be set up in and to any action at law.[4] And it has been said that the equitable defense is to be tried by a jury.[5] But such is not the view now taken; for if a suit involves both legal and equitable issues, only the issues at law are to be tried by a jury.[6] And if the answer to an action at law admits the plaintiff's cause of action and sets up a purely equitable defense, it converts the whole case into a suit in equity, triable by the court. If, on the other hand, the answer sets up two defenses, one equitable and the other legal, plaintiff is still entitled to his jury trial, in case the equitable defense does not prevail.[6] Affirmative relief may be given a defendant in all cases where, from the nature of the subject-matter and the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity jurisprudence. Thus, the defendant in ejectment may, in addition to

[1] Boyer v. Neel, 50 App. 26.

[2] Rhine v. Montgomery, 50 Mo. 566.

[3] McAdow v. Ross, 53 Mo. 199.

In ch. XX, § 549, the question is considered what defenses are consistent with a general denial.

[4] McCollum v. Boughton, 132 Mo. 601.

[5] State ex rel. v. Meagher, 44 Mo. 356.

[6] Ridgeway v. Herbert, 150 Mo. 606.

the defense of the legal title, also in a separate count of his answer invoke the aid of the court on its equity side to make the adjudication of his legal title final, and for an order restraining the plaintiff from further harassing him by subsequent actions of ejectment for the same property on the same title.[1] For it must be borne in mind that a judgment in an action of ejectment, if the legal title only is brought in question, does not constitute a bar to other and further actions of ejectment between the same parties and involving the same title. It is only when an equitable defense is interposed, and a judgment rendered in favor of defendant on the equities thus set up, that the judgment becomes final, and may be pleaded in bar in a subsequent action between the same parties concerning the same title.[2] It is now well settled in this state that under the Code a defendant in an action of ejectment may by his answer interpose an equitable defense, and that his equities may be tried and determined directly in that action, without having to resort to an independent suit in equity.[3] The defense to an action on an administrator's bond that the trust funds had been stolen is an equitable one, but may be pleaded to the action at law.[4]

**§ 537. Same — Decisions illustrating the doctrine.**—Where, to an action on the covenants of a deed, defendant sets up the equitable defense that by a mistake of the scrivener the deed did not correctly express the covenants, and that but for such mistake there would be no breach of the covenants, these facts may be shown in evidence, and, if proved, will defeat the action, though there is no prayer for a reformation of the deed to make it correctly express the intention of the parties.[5] And it is said by the supreme court that the defendant is entitled to whatever benefit the facts pleaded by him may give, whether the defense is legal or equitable in its nature.[6] Where an equity based upon a part performance is set up as a defense, it must be done with that degree of fullness and precision which is required in a bill framed with a view to a decree for specific performance.[7]

[1] Swope v. Weller, 119 Mo. 556.

[2] Sampson v. Mitchell, 125 Mo. 217.

[3] Clyburn v. McLaughlin, 106 Mo. 521, in which many of the previous cases are cited.

[4] State ex rel. v. Meagher, 44 Mo. 356.

[5] Barlow v. Elliott, 56 App. 374.

[6] Sachleben v. Heintze, 117 Mo. 520. That case was an action on certain promissory notes, and it was held that defendant might show, under proper allegations in his answer, that the execution of the notes was materially induced by an innocent, but substantial, misrepresentation on the part of the payee.

[7] Ells v. Pacific Railroad, 51 Mo. 200; Brown v. Brown, 106 Mo. 611.

## CHAPTER XX.

### THE ANSWER—THE DENIAL.


§ 538. General and specific.
539. Form of denial.
540. Negativing precise words of the petition.
541. Denial of indebtedness.
542. Averments as to value not traversable.
543. Negative pregnant.
§ 546. General denial.
547. Denying execution of instrument.
548. Effect of denying specifically what is admissible under general denial.
549. Joining other defenses with a general denial.


**§ 538. General and specific.**— Under our system only two kinds of denial are known, a general and a specific denial.[1] A general denial necessarily goes to the entire petition. Each specific denial is directed to some one of the allegations of the petition. These two modes of denial are, and must in their very nature be, separate and distinct. They cannot both be mingled in the same answer. Therefore an answer which "denies each and every allegation of the petition, except what is hereinafter expressly admitted," and one which, after making certain specific denials, goes on to say that "each and every allegation of the petition not herein admitted is denied," are each and both of them improper. And such is the ruling of the courts.[2]

**§ 539. Form of denial.**— Denials are not required to be of any particular form or to be couched in any special phraseology, but they must be expressed in language which conveys to the mind of the reader a clear understanding of the facts they are intended to put in issue.[3] A statement by defendant that he does not know whether a certain state of facts exists is not a sufficient denial.[4] Such an averment comes short of the statutory permission that defendant may aver that he has no knowledge or information sufficient to form a belief.[5] An allegation in an answer that plaintiff knew certain facts does not tender an issue as to the existence of such facts; and the plaintiff's traverse of

[1] Rev. Stat. 1899, sec. 604.

[2] See *post*, § 546.

[3] Clark v. Dillon, 97 N. Y. 370.

[4] Watson v. Hawkins, 60 Mo. 550; Henry v. Hinds, 18 App. 497.

[5] Rev. Stat. 1899, sec. 604. The evident intent of the statute is that defendant must obtain such information as he can by reasonable effort.

such an allegation is not an admission of the existence of such facts as are alleged to have been known.[1] In *Loler v. Cool*,[2] the plaintiff sued for damages for a failure on the part of the defendant to perform certain stipulations contained in a written lease, and set out the several particulars in which the defendant had failed to perform his contract. The answer averred that defendant "had in all respects faithfully kept its terms and complied with its conditions, except in the payment of taxes in the sum of $31." It was held that this answer was informal and defective in not specifically denying the several allegations of the petition.

§ **540. Negativing precise words of the petition.**— As a general rule it is not sufficient that the answer should negative the precise words of the petition.[3]

§ **541. Denial of indebtedness.**— A mere denial of indebtedness is not a sufficient answer. Thus, a general averment by a defendant that he does not owe the money sued for or any part thereof is not such a denial as is contemplated by the Code; he must answer the plaintiff's petition by a direct denial of its material averments, or by stating the facts upon which he relies as a defense.[4] And where the petition charges that defendant owes plaintiff for goods sold and delivered, an answer which merely denies the indebtedness impliedly admits the sale and delivery.[5] In *Engler v. Bate*,[6] we find what is well characterized by the supreme court as a specimen of very great looseness in pleading. In that case plaintiff, instead of setting out the contract on which he sued, and stating the particulars in which the defendant had failed to comply with the contract, simply stated the indebtedness of the defendant in certain specific sums for a failure on his part to comply with his contract in different particulars. To this petition the defendant filed an answer, which was in effect the old common-law plea of *nil debet;* that is, he merely answered that he was not indebted to the plaintiff, instead of answering the specific charges contained in the petition, and the court held that the answer was defective.[7] To deny the indebtedness is not

[1] Thomas v. Liebke, 13 App. 389.

[2] 37 Mo. 85.

[3] Dare v. Pacific Railroad, 31 Mo. 480. This question will be fully considered when treating the subject of negative pregnant. (See §§ 543–545, *post.*) The reader will there find the general rule stated and the exceptions discussed.

[4] Sappington v. Jeffries, 15 Mo. 628.

[5] Lee v. Casey, 39 Mo. 383.

[6] 19 Mo. 543.

[7] It is proper to state in this connection that the course which defendant should have pursued was, before answering, to file a motion to compel plaintiff to make his petition more

a denial of the existence of the contract out of which the petition avers the indebtedness arose.[1] In *Westlake v. Moore*,[2] the petition set forth a claim by plaintiff for services and attendance rendered to defendant on a journey from San Francisco to St. Louis, and for money expended for the use of the defendant, together with an account showing the items. The answer simply denied that defendant was indebted to the plaintiff for any one of the items stated in his petition. It was held that under the circumstances, the petition being so general, and in view of the fact that no objection was raised to it until the trial, the answer was sufficient.[3]

§ 542. **Averments as to value not traversable.**— In an action against a carrier for failure to deliver certain malt shipped by plaintiff, the petition stated the value of the malt, which allegation was not denied in the answer. The trial court told the jury that the value of the malt was admitted. But the supreme court held that this was erroneous, as the value of the article shipped was an immaterial averment, and need not be denied.[4] The same rule was announced in a later case, which was an action for a conversion, the court saying, while citing with approval the case just cited, "these allegations of value are not what are termed traversable, so as to conclude the opposite party if not answered."[5]

§ 543. **Negative pregnant.**—The doctrine of negative pregnant seems not to be fully recognized in Missouri,[6] and is treated by our courts as an informality only, on the ground that a denial which is evasive or ambiguous is faulty in form.[7] In an early decision, however, it was held that, where an action is brought upon an award rendered by arbitrators, and the answer alleges that one of the arbitrators was prejudiced and that such fact was unknown to defendant, if the replication denies the prejudice and that such fact was unknown to defendant, it thereby admits the prejudice.[8] On the other hand, in an action against a rail-

definite and certain, and when that was done he should have answered the specific averments of the petition, or should have filed a general denial.

[1] Springer v. Kleinsorge, 83 Mo. 152; Hurt v. Ford, 142 Mo. 283.

[2] 19 Mo. 556.

[3] See note 7 on preceding page.

[4] Wood v. Steamboat Fleetwood, 19 Mo. 529.

[5] Field v. Barr, 27 Mo. 416. See § 523, *ante*.

[6] Merchants National Bank v. Richards. 74 Mo. 77. Additional cases involving this question will be found in §§ 206, 207, *ante*.

[7] Law v. Crawford, 67 App. 150.

[8] Hyeronimus v. Allison, 52 Mo. 102.

road company for injury to stock arising from the failure of defendant to erect a fence where it was required by law to do so, the answer alleged that plaintiff had himself contracted to erect a fence along the line of defendant's railroad and had failed to do so, and that it was in consequence of this failure to erect the fence that his stock went on the railroad. The replication denied that plaintiff was bound by any contract with defendant to build the fence on his own land on the line of said railroad track as stated by defendant in his answer. The court held that this might be construed to be a negative pregnant, and that it impliedly admitted that some kind of contract had been made; but that, where a contract is thus collaterally set up in the pleadings, a denial such as the above is sufficient to require the party setting it up to produce it on the trial, so that its terms may be construed by the court.[1] In another case before the supreme court, the allegation of the petition was that on or about the 9th of March, 1852, A, being the owner of land in fee simple, made, executed, acknowledged and delivered to said H a deed by which he conveyed to said H the land in question. By his answer the defendant denied that the said A on the 9th day of March, 1852, *or at any time before or since*, made, executed, acknowledged and delivered to H a deed by which he conveyed to said H said land or any part thereof. It was held that this denial was not in the nature of a negative pregnant; nor was it bad for ambiguity.[2] If in an action for slander the answer denies that defendant wilfully, wantonly and maliciously spoke the slanderous words in the presence of the persons named in the petition, it does not thereby deny the speaking of the words but only the malice and attendant circumstances.[3] If a firm brings an action on a note payable to it as such, an answer which simply puts in issue the title of the plaintiffs to the note sued on, admits the partnership as alleged in the petition.[4]

**§ 544. Further discussion of the negative pregnant.**—In one case the supreme court declares unqualifiedly that it is not sufficient to negative the precise words of the petition.[5] But, as has already been shown, that doctrine is not adopted to its fullest extent. In the case just cited[5] the denial in the exact language of the petition was, as appears from the opinion of Judge Dryden,

[1] Ells v. Pacific Railroad, 55 Mo. 278.
[2] Wynn v. Cory, 43 Mo. 301.
[3] Lamberson v. Long, 66 App. 253.
[4] Arthur v. Pendleton, 7 Mo. 519.
[5] Dare v. Pacific Railroad, 31 Mo. 480.

so vague and indefinite as to leave it in the highest degree uncertain as to what issue defendant intended to present. But in *Wynn v. Cory*,[1] which has been already noticed (see next preceding section), the denial in the words of the petition is not open to the same objection, and it was there held to be sufficient. In the earlier case of *Emory v. Phillips*,[2] where the petition alleged that the defendant, without leave, did wrongfully enter upon a tract of land of which plaintiffs were the owners and in possession, and did take from the premises a house thereon used and employed as a Methodist meeting house or church, and carried off said house, and defendant denied that he "wrongfully entered upon the premises and took therefrom a Methodist church or meeting house of the plaintiffs," and the answer further charged the fact to be that the house spoken of was defendant's property, the answer was held to admit the taking away of the house, the court saying: "Although the answer does not frankly admit it, yet such is the evasive and improper manner in stating the defense that the law would construe this as admitting the taking, but not the ownership."[3]

§ 545. In *First National Bank v. Hogan*,[4] plaintiff alleged that a certain insurance company, by its draft in writing signed by its secretary, created the obligation sued on. The answer simply denied that the company "by its draft in writing signed by its secretary" executed the obligation as alleged. In that case the court held that, while the denial was inartistic, it was sufficient under the Code. The least that can be said, however, with reference to this mode of denial, is that it is exceedingly loose, that it is liable to the charge of vagueness and uncertainty, and is not to be commended. If it is desired to put in issue each specific allegation of the petition, the answer should deny each separately.[5]

[1] 43 Mo. 301.
[2] 22 Mo. 499.
[3] Id., p. 501.
[4] 47 Mo. 472.
[5] For example, in the case of Dare v. Pacific Railroad, 31 Mo. 480, the allegations of the petition might be denied in the following form: "Defendant denies that it employed the plaintiff as ticket agent for the term of one year or for any other term, and denies further that it ever agreed or promised to pay plaintiff the sum of $1,200, or any other sum." Or if, as in that case, the fact was that plaintiff was employed by defendant, but not for the time alleged in the petition, that averment alone should be denied as follows: "Defendant denies that it employed plaintiff as a ticket agent for the term of one year, or for any definite term or period, but alleges that it employed him at the rate of $100 per month during such time only as plaintiff should be retained by defendant; and that it did on the 19th day of

**§ 546. General denial.**— Section 604[1] requires that the answer shall contain a general or specific denial of each material allegation of the petition which is intended to be controverted by the defendant, or any knowledge or information thereof sufficient to form a belief. But whichever form the answer assumes it must fall within one of these classes; it cannot partake at the same time of a general and of a specific denial.[2] If it is designed to make a general denial, the answer should be that defendant denies each and every allegation of plaintiff's petition. It is bad pleading to say that defendant denies each and every allegation contained in the petition, except as hereinafter admitted. It is such an answer which constitutes a mingling of the general with the specific denial.[3] But the objection to such an answer must be taken before trial, or its objectionable character will be waived.[4] Again, it is not proper that the denial of the answer should be of each and every "material" allegation of the petition, since the court and the adverse party are not to be left to conjecture what allegations the defendant deems material.[5] But this defect also is waived, if the parties proceed to trial on it without objection.[6] Where an answer closes with a general denial of all the allegations of the petition not therein admitted to be true, it avails nothing as a general denial, if the specific defenses pleaded in the answer are all predicated upon the truth of the facts charged.[7]

**§ 547. Denying execution of instrument.**— Where the instrument sued on has been rendered void by an alteration, an allegation of the fact of such alteration is a sufficient plea of *non est factum*.[8] Where an insane person is sued on an instrument in writing, the answer of his guardian admitting the execution of the instrument by his ward, but alleging that the ward was at the time of unsound mind, is equivalent to a plea of *non est factum*, for, while it admits the manual act of signing, it denies the consenting mind, without which no act can possess any contractual force.[9] Where, in an action by an assignee of an in-

June discharge plaintiff, and paid him for the time he had served defendant." For further decisions on the question of negative pregnant, see §§ 206, 207, *ante*.

[1] Rev. Stat. 1899.

[2] But this must not be confounded with the pleading of a general denial and in the same answer setting up special defenses, this latter being admissible. See §§ 548–550, *post*.

[3] Long v. Long, 79 Mo. 644; Bradley v. Phœnix Ins. Co., 28 App. 7; Walker v. Phœnix Ins. Co., 62 App. 209.

[4] Collins v. Trotter, 81 Mo. 275.

[5] Edmondson v. Phillips, 73 Mo. 57; Pry v. Hannibal & St. J. R. Co., 73 Mo. 123; Smith v. Lindsey, 89 Mo. 76.

[6] Smith v. Lindsey, 89 Mo. 76.

[7] State ex rel. v. Firemen's Fund Ins. Co., 152 Mo. 1.

[8] Law v. Crawford, 67 App. 150.

[9] Collins v. Trotter, 81 Mo. 275.

strument, the plea is *non est factum*, the fact of the assignment is admitted.[1]

**§ 548. Effect of denying specifically what is admissible under general denial.**— Matters of defense specially pleaded may be stricken out if they are such as would be admissible in evidence under a general denial.[2] But, although the court should strike out such special defenses where the answer contains a general denial, and the evidence to support the special defenses is admissible under the general denial, yet the judgment will not be reversed because the court refuses to strike them out. Plaintiff cannot by any possibility be prejudiced by such refusal.[3]

**§ 549. Joining other defenses with a general denial.**— In an action on a promissory note, the answer may plead the general issue, want of consideration and payment.[4] So, too, the several pleas of *non est factum* as to the instrument sued on, the payment of another debt on a different note which appears by the pleadings and the evidence only as tending to show why defendant is not liable on the note sued on, and the statute of limitations, may all be joined in the same answer.[5] In a reply, a plea of ratification may be joined with a general denial if, under the circumstances, it appears that both may be true.[6] In *Nelson v. Brodhack*[7] it is decided that the defense of the statute of limitations may be set up in the same answer with a general denial. Says Bliss, J.: "If we were to limit our statutory allowance of consistent defenses by the strict logic of the old special pleas in bar, all special defenses would be cut off when the cause of action was denied; for such special defenses are technically supposed to confess and avoid, although in fact they may not confess at all. Such an interpretation of the statute should not be adopted if there is any other that will give a party his clear right to several defenses." (p. 598.) It is true that was an action of ejectment, in which the bar of the statute of limitations may be shown under a general denial without being specially pleaded. Of the same character is the case of *Ledbetter v. Ledbetter*,[8] in which *Nelson v. Brodhack*[7] is followed. But it is also

[1] Ragland v. Ragland, 5 Mo. 54; Davis v. Imboden, 10 Mo. 340.

The subject of denying the execution of an instrument under oath is treated of in ch. XXV.

[2] Sargent v. St. Louis & S. F. R. Co., 114 Mo. 348.

[3] Fulkerson v. Mitchell, 82 Mo. 13.

That a general denial by one defendant may be used for the benefit of another defendant, see *ante*, § 519.

[4] Patrick v. Boonville Gaslight Co., 17 App. 462. See also § 529, *ante*.

[5] May v. Burk, 80 Mo. 675.

[6] Moore v. Macon Sav. Bank, 22 App. 685.

[7] 44 Mo. 596.

[8] 88 Mo. 60.

followed in *Cohn v. Lehman*,[1] which was not an ejectment case, but was an action on an injunction bond. And in both the cases last cited the principle laid down in *Nelson v. Brodhack* is approved, the court saying in the latter case that "it may be considered the well-settled doctrine in this state that traverses and answers in avoidance may go together when not inconsistent."[2] And in an action of trespass it is said that a general denial, a justification and a plea of the statute of limitations are not inconsistent.[3] But where a suit is brought to enforce a contract for the purchase of land, the vendee cannot plead the statute of limitations, which would rescind the contract and leave the title in plaintiff, and at the same time insist on having the contract performed by a delivery to him of a deed from plaintiff.[4] When the answer contains both a general denial and a special plea, the denials must be so framed as to leave no doubt in the mind of the court and the adverse party as to what is denied and what admitted.[5]

**§ 550. The doctrine further illustrated.**—In an action of slander, pleas of justification and the statute of limitations may be joined with a general denial.[6] In an action for an assault and battery, the plea that plaintiff made the first assault, and that plaintiff was unlawfully in defendant's dwelling and refused to leave, and that defendant used sufficient force, and only such force as was necessary, to put him out, may be joined with a general denial.[7] In an action of ejectment defendant may plead a general denial and rely upon that as a complete defense, and may also in the same answer plead and rely upon an equitable defense; but the pleading must be so framed as to show that both defenses are relied on.[8] Thus a general denial may be joined with the plea that plaintiff obtained the land in question by purchase at a trustee's sale which was void.[9] Where the answer of plaintiff in an attachment suit to an interplea therein is a general denial, with additional averments of special fraudulent acts, the plaintiff will not be confined to the specified acts of fraud, but may under the general denial introduce evidence relating to other frauds connected with the transaction.[10]

[1] 93 Mo. 574.

[2] Id., p. 583.

[3] McCormick v. Kaye, 41 App. 263.

[4] Adair v. Adair, 78 Mo. 630.

[5] Long v. Long, 79 Mo. 644. Consult also § 527 *et seq.*, *ante*.

[6] Wood v. Hilbish, 23 App. 389; McCormick v. Kaye, 41 App. 263; Nelson v. Wallace, 48 App. 193.

[7] Rhine v. Montgomery, 50 Mo. 566.

[8] Ledbetter v. Ledbetter, 88 Mo. 60.

[9] Fisher v. Stevens, 143 Mo. 181.

[10] Simon v. Simcox, 75 App. 143. In this connection § 527 *et seq.*, *ante*, should be consulted.

## CHAPTER XXI.

### THE ANSWER — WHAT MAY BE SHOWN UNDER A GENERAL DENIAL.


§ 551. The general issue and the general denial compared.
552. Decisions applying the above rules.
553. Illustrative cases.
§ 564. Showing that the contract is within the statute of frauds.
565. Where the petition contains unnecessary averments.
566. The extent of the rule.


**§ 551. The general issue and the general denial compared.** Having shown the nature of a general denial and the rules governing it, and having determined what special defenses may be joined with the general denial, it remains to consider what may be shown under a general denial; what defenses are covered by it, and the character of the proof admissible under it. And here it is well to warn the reader that he must by no means confound the general denial of the Code with the general issue known to the common law. Between the two there is a marked distinction. In fact, they possess little in common except the adjective which designates them both. In the opinion by Bakewell, J., in *Turner v. Thomas*,[1] I find a clear statement of this distinction between the general issue at common law and the general denial under the Code. He points out that evidence which would have been admissible under the general issue in common-law pleadings may be incompetent under our general denial. Evidence which confesses the original liability and is matter in avoidance was largely admitted under the general issue, but is not admissible under the general denial. Facts which support the denial need not, as a general rule, be specially pleaded under the Code; the rule being that new facts which show that plaintiff's statements are untrue may be proved under a denial, but that facts consistent with the truth of plaintiff's statements, but which show that he has nevertheless no cause of action, are new matter which must be specially pleaded. What is apparently new matter may be admissible under a general denial where the facts constituting the new matter do not confess and avoid, but tend

[1] 10 App. 333.

to disprove the allegations of the petition. Subsequently the same rule is announced by that court in a later case, the court, speaking through Bond, J., saying: "Under our practice act the rule is that all defenses which do not disprove the allegations necessary to the support of the plaintiff's case must be affirmatively pleaded in the answer."[1]

**§ 552. Decisions applying the above rules.**— That this view is abundantly supported by the decisions in this state is beyond question. Thus it has been repeatedly held that under the common law anything might be shown under the plea of the general issue which went to make a valid defense; but under the Code, if defendant rests his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in ordinary and concise language, or he will be precluded from giving evidence of it at the trial.[2] If defendant intends to rely upon any matter which goes to defeat or avoid plaintiff's action, he must set it forth.[3] A distinct affirmative defense cannot be given in evidence under a general denial.[4] If the contract upon which the cause of action is based is to be invalidated by reason of some extrinsic matter, such matter must be pleaded.[5] Evidence of facts which admit the act charged, but which avoid its force or effect, or which go to discharge the obligation, is not admissible under a general denial; for under a general denial the defendant is not permitted to show any fact which does not go directly to disprove the fact denied.[6] But any evidence is admissible which tends to show that a cause of action never existed, or that it was void *ab initio*.[7] If a cause of action which once existed has been determined by some matter which subsequently occurred, such new matter must be specially pleaded; but if the cause of action alleged never existed the appropriate defense is a general denial, and evidence of such facts as tend to prove or to disprove the controverted allegations are pertinent.[8] Under the general denial defendant may give evidence of any-

[1] Scudder v. Atwood, 55 App. 512, 521.

[2] From the numerous cases announcing this doctrine I cite the following: Northrup v. Miss. Valley Ins. Co., 47 Mo. 435; Guinotte v. Ridge, 46 App. 254; Musser v. Adler, 86 Mo. 445; Higgins v. Mo. Pac. R. Co., 43 App. 547.

[3] Guinotte v. Ridge, 46 App. 254; Musser v. Adler, 86 Mo. 445.

[4] Muelrath v. Roemheld, 3 App. 564.

[5] Meier v. Proctor, 81 App. 410.

[6] Mize v. Glenn, 38 App. 98.

[7] Hoffman v. Parry, 23 App. 20; Scudder v. Atwood, 55 App. 512; Madison v. Mo. Pac. R. Co., 60 App. 599; Law v. Crawford, 67 App. 150.

[8] Greenway v. James, 34 Mo. 326; Hardwick v. Cox, 50 App. 509; Thomas v. Ramsey, 47 App. 84.

thing which tends to show that at the institution of the action plaintiff had no title to the matter in controversy, or no right to his alleged cause of action; thus defendant may show fraud in the acquisition of plaintiff's title, or that ownership was in a third person.[1] Defendant is entitled to make any proof which includes a fact within the terms of the allegations necessary to support the plaintiff's case.[2] A general denial of the making of a contract puts in issue every fact essential to the original creation of the obligation, such, for example, as the mental capacity of the parties.[3] It logically follows from the above principles that facts occurring since the institution of the suit cannot be shown under a general denial.[4]

§ 553. **Illustrative cases.**— In *Madison v. Missouri Pacific R. Co.*,[5] which was an action for personal injuries, the negligence alleged was a failure by defendant to construct and maintain a proper farm crossing, by reason of which plaintiff, while passing over the crossing with a load of hay, was injured by the overturning of the wagon. The answer was a general denial, and defendant proved that its section foreman told plaintiff that if he would inform him, the foreman, when he got ready to haul hay he would put planks on the inside of the rails at the farm crossing so as to make it safe, but that plaintiff did not inform the foreman, and on the contrary proceeded to haul his hay without giving any notice of that fact, and undertook to cross the track in the condition in which it then was. But the court refused an instruction asked by the defendant based on this evidence, the ground of the refusal being that under the general denial such an issue could not be raised. In reversing the judgment for the plaintiff, Smith, P. J., says: "The defense set up is not the termination by subsequent occurrences of a once subsisting cause of action, but it is a denial that any cause of action ever came into existence, in consequence of the arrangement which the evidence tends to show was entered into between plaintiff and defendant.

[1] Thomas v. Ramsey, 47 App. 84; Plano Mfg. Co. v. Cunningham, 73 App. 376. The same rule applies to a reply to new matter contained in the answer. Flint-Walling Mfg. Co. v. Ball, 43 App. 504.

[2] Hoffman v. Parry, 23 App. 20; Hyde v. Hazel, 43 App. 668.

[3] Cavender v. Waddingham, 2 App. 551.

[4] Cato v. Hutson, 7 Mo. 142. It should be noted, however, that this decision rests upon a special statute, although there can be no doubt of the correctness of the doctrine, independent of any statute. The doctrine is recognized by the court of appeals in Plano Mfg. Co. v. Cunningham, 73 App. 376.

[5] 60 App. 599.

The answer does not confess and avoid, but denies that the defendant owed the plaintiff the duty for the breach of which the action is brought. The facts proved under the defendant's general denial were not new matter constituting a defense, but they tended to disprove the allegations of the petition. They showed that the defendant did not owe plaintiff the alleged duty, or, in other words, that defendant had been relieved of that duty by the arrangement then subsisting between it and the plaintiff. The tendency of the evidence was to show that the alleged duty was suspended, and not owing to the plaintiff at the time of the injury. Under the general denial the defendant might prove any fact which went to show plaintiff never had a cause of action against it. It seems to us defendant's proof included a fact within the terms of the allegations necessary to support plaintiff's case." (p. 607.)

§ 554. In the opinion in the foregoing case the learned judge cites a decision of the St. Louis court of appeals,[1] which fully sustains the position taken. There the action was to recover the value of certain plans and specifications for ten houses furnished to defendant by plaintiff, who was an architect, and the answer was a general denial. The defense was that plaintiff had agreed with defendant to make the plans and specifications, and to ask no compensation therefor unless the houses were actually built, and that the houses never were built. The appellate court held that the evidence was admissible, and that the defense did not constitute new matter. "The allegation of the petition," says Bakewell, J., "is that defendant made a certain contract. Defendant does not admit this; he denies it, and endeavors to make good his denial by showing that the contract made was different in terms from that set up in the petition. An answer setting up new matter should confess and avoid; but defendant in the present case does not confess and avoid, but denies the contract on which the action is founded. The facts tended directly to disprove the allegations of the petition." (p. 126.)

§ 555. A general denial puts in issue the facts alleged in the petition, but not the liability. The facts, if any, from which the law draws the conclusion of non-liability must be specifically set out in the answer, if they are not stated in the petition.[2] Where an attachment against a landlord is served on the growing crops in possession of his tenant, evidence offered at the trial that the

[1] Stewart v. Goodrich, 9 App. 125. [2] Musser v. Adler, 86 Mo. 445.

sheriff had subsequently turned over part of the attached crop to the landlord is not admissible under a general denial to the tenant's interplea, since that was a matter occurring after the institution of the attachment, and must be raised by a special plea.[1] So in an action brought under the statute to recover money lost at gaming, any matter of defense arising subsequently to the filing of the plea cannot be given in evidence under a general denial.[2]

§ 556. It cannot be shown under a general denial that a provision of the constitution has been violated. Thus, if the right of plaintiff to relief depends upon the validity of certain bonds, it cannot be shown, unless specially pleaded, that the bonds were issued in violation of section 8 of article XII of the Missouri constitution, relating to the issue of bonds by a corporation.[3] Where the answer of defendant alleges compliance with the interstate commerce law of the United States, and the reply is a general denial, the validity of that federal statute is not drawn in question; since the reply puts in issue only the averment of compliance with the law, and not the validity of the law.[4]

§ 557. In an action on a bond the plea of *non est factum* puts in issue only the execution of the bond.[5] Defendant cannot show under that plea that the bond sued on was a stake to be put up by him against a similar bond by the plaintiff, as a wager upon the result of an election. Such a defense must be specially pleaded.[6] When a deed is void *ab initio*, and is not merely voidable, a plea of *non est factum* is proper, and under such plea any facts showing the conveyance to be void may be given in evidence.[7]

§ 558. In an action upon a promissory note given in payment of rent, defendant set up that plaintiff promised, in consideration of a surrender of the leasehold upon which defendant had made certain improvements, to pay for the improvements. It was held that this meant a payment forthwith and in money, and that under a general denial in the reply plaintiff had the right to prove that he agreed that the improvements should be paid in the rents accruing subsequent to the note, or be deducted from such rents.[8]

[1] Plano Mfg. Co. v. Cunningham, 73 App. 376.

[2] Cato v. Hutson, 7 Mo. 142.

[3] German Savings Inst. v. Jacoby, 97 Mo. 617.

[4] Vaughn v. Wabash R. Co., 145 Mo. 57.

[5] State to use v. Ferguson, 9 Mo. 285.

[6] Stapleton v. Benson, 8 Mo. 13.

[7] Corby v. Weddle, 57 Mo. 452.

[8] Wilkerson v. Farnham, 82 Mo. 672.

§ 559. In an action for the wrongful taking and conversion of a stock of goods, evidence is admissible under a general denial to show that the mortgage under which plaintiff claimed was fraudulent and void as to the creditors of the mortgagor.[1] Where in an attachment suit an interplea is filed, and the interpleader alleges generally his ownership of the attached property and consequent right of possession, and the plaintiff in the attachment suit puts these allegations in issue by a general denial, any proof on the part of the plaintiff which goes to show that the interpleader, at the time the property was levied on under the attachment, was not the actual owner and was not entitled to the possession, is admissible, even though it extends to the question of fraud in the acquisition of the interpleader's title, or goes to show that the ownership was in a third party.[2] In an action by a wife to recover money which her husband had stolen from her and had delivered to defendant, if the plaintiff by her evidence assails the good faith of defendant, defendant may show that he received the money in good faith, even though he has made no such averment in his answer.[3]

§ 560. Where an action is brought to enforce a mechanic's lien and defendant relies upon a special contract between him and plaintiff, he must set up such contract and the breach of it as a special defense; such defense cannot be shown under a general denial.[4]

§ 561. If it becomes necessary, in order to support plaintiff's case, that he should prove the execution of a power of attorney by defendant, and that the money for which the action is brought was paid to such attorney, it is competent for defendant, under a general denial, to show how the power of attorney came to be executed, that it was done through another party as one of the necesssary steps in the collection of the money, that he had no recollection that the power was executed, and that he never knew that a payment had been made to the attorney in fact.[5]

§ 562. In an action for flooding plaintiff's land defendant cannot, under a general denial, show that such a flooding was a benefit to plaintiff.[6]

§ 563. Where the action is to recover the price of a specific lot of grain which plaintiff claimed to have sold to defendant, and

[1] Hardwick v. Cox, 50 App. 509.
[2] Plano Mfg. Co. v. Cunningham, 73 App. 376.
[3] Courtial v. Lowenstein, 78 App. 485.
[4] Meyer v. Broadwell, 83 Mo. 571.
[5] Hoffman v. Parry, 23 App. 20.
[6] Mize v. Glenn, 38 App. 98.

the answer is a general denial, since plaintiff must make out not only the sale, but also the delivery of the grain, defendant may, under such denial, give evidence of anything which would tend to disprove either of those facts. Thus, he may show that the wheat which he bought was good wheat, while the wheat delivered to him by plaintiff was spoiled and damaged.[1]

**§ 564. Showing that the contract is within the statute of frauds.**— It follows from the principles laid down above that the statute of frauds may be shown in defense of an action on a contract, though it is not specially pleaded, since it is for plaintiff to prove that the contract on which he sues is one which is legally binding.[2]

**§ 565. Where the petition contains unnecessary averments.** Not infrequently the petition, either through oversight or design, contains allegations of fact which are under the strict rules of pleading unnecessary to the plaintiff's case. It then becomes an important question whether plaintiff is bound to prove such unnecessary averments, and whether defendant can under a general denial introduce evidence to disprove them, though they may be of such a nature that they could not ordinarily be shown under a general denial. I think the current of authority in the states which have adopted the code system is that such proof may be made by the defendant in such a contingency. But such is not the view taken by our own courts, at least in the more recent decisions. In *Karle v. Kansas City, St. J. & C. B. R. Co.*,[3] it was, indeed, held that the plaintiff by making such an unnecessary averment puts in issue the fact unnecessarily alleged. That was an action against a railroad company for the killing of plaintiff's husband. The allegation of the petition was that "the killing was done by the negligence of defendant, without any negligence or fault of the plaintiff's husband." The answer was a general denial. It was held that by this general denial the issue was raised whether the deceased had been guilty of contributory negligence, a defense which is under our decisions an affirmative one. But this decision has been repudiated in *Hudson v. Wabash Western R. Co.*[4] In that case, too, the petition alleged that the plaintiff was injured "without any fault on his part," and defendant interposed a general denial, as in the pre-

[1] Montgomery v. Gann, 51 App. 187.

[2] Hackett v. Watts, 138 Mo. 502; Porter v. Citizens' Bank, 73 App. 513; State ex rel. v. Cape Girardeau Waterworks Co., 74 App. 273; Hillman v. Allen, 145 Mo. 638. See § 592, *post.*

[3] 55 Mo. 476.

[4] 101 Mo. 13.

ceding case. The court, in deciding that the defense of contributory negligence was not raised by the answer, declared that the utterance in *Karle v. Railroad*[1] "was only *obiter*, and should not be regarded as possessing any authoritative value.[2] The rule in this state undoubtedly is that, if facts alleged in the petition are unnecessary to sustain the plaintiff's case, they are merely surplusage, and though in his answer defendant denies them he will not be allowed to introduce evidence in regard to them, unless he sets out the facts constituting his defense specifically. Thus, where in a suit upon a special tax-bill plaintiff alleges that the work was well and faithfully done, and the answer is simply a general denial, such allegation being unnecessary to a good petition, defendant will not be allowed to show under his general denial the imperfect character of the work done.[3] The case of *Hyde v. Hazel*[4] was decided on the authority of *Hudson v. Railroad*.[5] The petition contained an averment that "there is due plaintiff the sum of two hundred and fifty dollars." It was claimed by defendant that this allegation, though unnecessary to the proper statement of plaintiff's case, yet when met by a general denial would let in evidence, such as payment, going to show that such sum was not due him. But the court held that this position was erroneous. It is said in the opinion that the case of *Bogie v. Nolan*,[6] which at first blush would seem to countenance a different doctrine, was decided upon the peculiar facts of that case. There the allegation of the petition was that defendant's intestate for a valuable consideration executed and delivered to plaintiff the notes upon which the action was based, and the answer was a general denial. The supreme court stated the well known rule that ordinarily it is sufficient, in an action on a promissory note, to state merely its execution and plaintiff's ownership; and that if the note has been paid, defendant must plead that fact. But here plaintiff stood in a confidential relation to the deceased, and the court held that it was incumbent on him to prove not only that the deceased executed the notes, but that they were given to him in good faith and that the deceased received value for them. And for that reason, and for that alone, the decision was that under a general denial it could be shown that the maker of the notes did not in fact receive any consideration for them.

[1] 55 Mo. 476.

[2] Sections 101 and 102 of chapter V should be consulted in this connection.

[3] Guinotte v. Ridge, 46 App. 254.

[4] 43 App. 668.

[5] 101 Mo. 13.

[6] 96 Mo. 85.

§ 566. **The extent of the rule.**— But the rule does not extend to a case where the averment in the petition is a material and necessary one. For while it is generally true that in an action to recover money the defense of payment is not admissible under a general denial, yet where the fact of non-payment is stated in the petition as a necessary and material averment to constitute plaintiff's cause of action, a general denial will be sufficient to permit defendant to show a payment;[1] and the same principle is clearly recognized in *Wheeler & Wilson Mfg. Co. v. Tinsley*.[2] The *Peterson* case was an action brought on a constable's bond for fees which it was alleged the defendant collected as constable and refused to pay over to plaintiff, the justice of the peace. The evidence showed the collection of the fees, and plaintiff denied that they had been paid over. Under the general denial defendant offered to show full payment, but was not permitted to do so. This was held by the supreme court to be error, since, in order that plaintiff should recover, it was necessary for him to prove not only the collection of the fees by the constable, but that demand of payment had been made on him and that such demand was refused, and each of these issues was met by the general denial.[1]

[1] State ex rel. v. Peterson, 142 Mo. 526. [2] 75 Mo. 458.

## CHAPTER XXII.

### THE RULES AS TO WHAT MAY BE SHOWN UNDER A GENERAL DENIAL APPLIED TO SPECIFIC ISSUES AND PROCEEDINGS.


§ 567. Right of plaintiff to sue.
568. Matters of excuse or justification.
569. Jurisdiction.
570. Incorporation.
571. Estoppel.
572. Ratification.
573. In actions based upon statute or ordinance.
574. Former recovery.
575. Waiver.
576. Adequate remedy at law.
577. Showing fraud or illegality.
582. Fraud or illegality — Actions in replevin.
584. Agency.
585. Alteration.
586. Assignment.
587. In actions on bills and notes.
588. In actions on bonds.
589. In actions against carriers.
590. In actions on contracts.
592. Showing that the contract is void under the statute of frauds.
593. Contracts — Showing custom.
594. Proving damages.
595. In actions of ejectment.
596. Same — Attacking deed for fraud.
597. Same — Showing the deed is an escrow.
§ 598. Same — Action by pretermitted heirs.
599. Same — Where title comes through deed of trust.
600. Same — Outstanding equities.
601. In an action for homicide.
602. The issue of infancy.
603. In actions between landlord and tenant.
604. Showing a bar by limitation.
605. Avoiding plea of the statute of limitations.
606. In actions for malicious prosecution.
607. In actions between employer and employee.
608. In mechanics' lien suits.
609. In actions for negligence.
610. In actions against officers.
611. Payment or tender.
613. In actions for personal injuries.
614. Purchaser for value.
615. In a proceeding to quiet title.
616. In actions against railroad company.
617. In replevin.
619. In cases of sale.
620. In actions on tax-bills.
621. In actions for trespass.


**§ 567. Right of plaintiff to sue.**—If defendant desires to show that plaintiff has no interest in the suit because he has assigned the cause of action and all his interest in it, this must be affirmatively pleaded, and cannot be shown under a general denial.[1]

[1] Goetz v. Ambs, 27 Mo. 28.

But defendant may show under a general denial a want of capacity in the plaintiff to sue. Therefore an allegation in the petition that plaintiff is an administrator of an estate is put in issue by a general denial.[1]

§ 568. **Matters of excuse or justification.**— Under a general denial in an action for assault and battery, the defendant cannot introduce evidence tending to prove a justification of the assault.[2] Matters of excuse or justification for a failure to acknowledge satisfaction of a deed of trust or mortgage as required by the statute must be specially pleaded and cannot be shown under a general denial.[3] In actions for libel or slander, justification may be pleaded in connection with a general denial,[4] and therefore must be specially pleaded.

§ 569. **Jurisdiction.**— In an action on a foreign judgment the jurisdiction of the court rendering the judgment is put in issue by a general denial, but the merits of the judgment are not.[5] And it may be shown under a general denial that the appearance of one who purported to be an attorney for the defendant was unauthorized.[6]

§ 570. **Incorporation.**— Where the action is brought by a corporation, a general denial goes to the merits, and admits the corporate capacity of the plaintiff and its ability to sue.[7] But a general denial puts in issue the incorporation of the plaintiff where the incorporation is not by public act, and where the suit is not upon a contract made with the plaintiff under the name by which it sues.[8]

§ 571. **Estoppel.**— An estoppel must be specially pleaded; it cannot be shown under a general denial.[9]

§ 572. **Ratification.**— It cannot be shown under a general denial that an act which was originally unauthorized has been ratified by the party sought to be held; in order to let in proof of a ratification it must be specially pleaded.[10]

[1] Gilmore v. Morris, 13 App. 114. See also § 570, *post*.

[2] Thomas v. Werremeyer, 34 App. 665; Sloan v. Speaker, 63 App. 321.

[3] Wiener v. Peacock, 31 App. 238.

[4] See § 549, *ante*.

[5] Crone v. Dawson, 19 App. 214.

[6] Hays v. Merkle, 67 App. 55.

[7] Farmers' Bank v. Williamson, 61 Mo. 259.

[8] Girls' Industrial Home v. Fritchey, 10 App. 344.

[9] Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235; Tyler v. Tyler, 78 App. 240.

[10] Capital Bank v. Armstrong, 62 Mo. 59; Wade v. Hardy, 75 Mo. 394; Noble v. Blount, 77 Mo. 235; Ferneau v. Whitford, 39 App. 311.

**§ 573. In actions based upon statute or ordinance.**— Where plaintiff seeks to recover for injuries caused by the running of a train within the limits of a city at a speed prohibited by the ordinance of such city, defendant cannot, under the general denial, introduce evidence of the unreasonableness of the ordinance.[1] Municipal ordinances are presumptively valid; and in street-opening proceedings facts showing their invalidity must be specially pleaded.[2]

**§ 574. Former recovery.**— In a case decided before the adoption of the practice act, it was held that a former recovery may be given in evidence under the plea of *non assumpsit*.[3]

**§ 575. Waiver.**— Where the petition avers that a certain rule of a railroad company has been violated, a general denial puts in issue only the fact of the violation of the rule; if it is desired to raise the issue of a waiver or abandonment of the rule, that fact must be pleaded.[4]

**§ 576. Adequate remedy at law.**— We have seen, in considering the essential averments of a good petition, that in a bill for an injunction it must be made to appear that the plaintiff has no adequate remedy at law.[5] Whether it is necessary for the defendant in equity to specifically set up the defense that plaintiff has an adequate remedy at law is a question which has been variously decided in this state. If the case made by plaintiff shows that he has an adequate remedy at law, his bill will be dismissed, whether defendant has pleaded that fact or not.[6] The earlier decisions are to the effect that defendant will not be allowed to show that fact unless it is set up in the answer.[7] But in *Humphreys v. Atlantic Milling Co.*,[6] Judge Black reviews the question and says that under the Code the plea of adequate remedy at law has no place, and he holds that the defense may be shown under a general denial. This decision was, upon a rehearing, concurred in by all the judges present. It is expressly stated in the opinion that the decisions last cited,[7] as well as that of *Harper v. Rosenberger*,[8] are no longer of binding authority.

[1] Bluedorn v. Mo. Pac. R. Co., 121 Mo. 258.

[2] St. Louis v. Gleason, 15 App. 25.

[3] Hempstead v. Stone, 2 Mo. 65.

[4] Alcorn v. Chicago & Alton R. Co., 108 Mo. 81. That under some circumstances a waiver may be shown under a general denial in an action of replevin is held in Oester v. Sitlington, 115 Mo. 247.

[5] See § 484, *ante*.

[6] Humphreys v. Atlantic Milling Co., 98 Mo. 542.

[7] Blair v. Chicago & Alton R. Co., 89 Mo. 383; Shickle v. Watts, 94 Mo. 410.

[8] 56 App. 388; and necessarily the earlier court of appeals decision in Luecke v. Tredway, 45 App. 507.

Therefore it must now be considered settled that defendant may, under a general denial, show that plaintiff has an adequate remedy at law. This question came before the full bench of the supreme court in *Verdin v. St. Louis*.[1] That case was decided by a divided court, and the point is not discussed in the opinion of the majority. But in the minority opinion[2] it is held that where a suit in equity is filed by an abutting property owner to cancel a tax-bill, and to divest the lien thereof, if the tax-bill has been issued, or, if it has not been issued, to enjoin its issuance, the petition must affirmatively show on its face by a particular statement of facts, as distinguished from legal conclusions and general allegations of fraud, that the plaintiff has no adequate and complete remedy at law; that such showing is a jurisdictional necessity, and the failure to show it may at any time, or at any stage of the proceedings, be taken advantage of by the court of its own motion, or by the defendant, whether or not the defense has been pleaded. If the tax-bill, together with the contract for the work, are set out in the petition and are averred to be null, void and of no effect, and it is further alleged that plaintiff's property cannot in any manner be legally bound for the tax because the ordinance under which the work was done was contrary to the charter, and if it appears that all this is matter of record, there is disclosed an adequate remedy at law by a defense to an action on the tax-bill, or by a writ of *certiorari*.

§ 577. **Showing fraud or illegality.**— The question whether under a general denial defendant may show that the contract was fraudulent, illegal or contrary to public policy has been before our courts in several instances, and the answer to it has not been entirely uniform. It would seem that the principle upon which it is to be determined what evidence is admissible under a general denial should be the one laid down in *Greenway v. James*,[3] that where a cause of action which once existed has been determined by some matter subsequently transpiring, such new matter must be specially pleaded, but where the cause of action alleged never existed, the appropriate defense would be a denial of the allegations of the petition, and under such denial such facts as tend to disprove the existence of the contract will be pertinent.[4] Thus, it has been held in an action on a note that defendant may show under a general denial that his signature to

[1] 131 Mo. 26.

[2] Written by Sherwood, J., and concurred in by Brace and Robinson, JJ. See p. 105 *et seq.*

[3] 34 Mo. 326, 328.

[4] See also ch. XXI.

the note was procured by fraud.[1] An application of this principle to cases of illegality would naturally lead to the same conclusion, namely, that it could be shown under a general denial that the contract sued on was void in its inception on account of illegality or because of being contrary to public policy. But such is not the weight of authority in this state. Among the earlier cases in which the question was considered is that of *Moore v. Ringo*,[2] where under a general denial the defendant attempted to show that the contract sued on was champertous. The court held that this could not be allowed, saying: "A general plea of want of consideration, or failure of consideration, has always been admissible, but where the defense is that the real consideration is an illegal one, the facts constituting the illegality must be set forth." (p. 473.) So, in *Musser v. Adler*,[3] the defense which was sought to be introduced was that the services rendered by plaintiff were illegal and contrary to public policy, and the court says: "This defense, so far as pleading is concerned, is not unlike that of champerty, gaming, usury, and the like; it is an affirmative defense, and should be clearly and distinctly stated." (p. 449.)[4] In *St. Louis Agricultural & Mechanical Ass'n v. Delano*,[5] the court, following the preceding decisions, sets forth more fully the reason for its conclusion. It says, speaking through Sherwood, J.: "There is nothing on the face of the petition which indicates any other than a valid contract between plaintiff and defendant; and when this is the case the rule is that, if the contract is to be invalidated by reason of some extrinsic matter, such matter must be pleaded in order that it be made issuable at the trial." And it holds that a general denial is not sufficient to let in the proof. But this is not purely a question of what the averments of the petition are; for the court says, in *School District v. Sheidley*,[6] that the rule is that if a plaintiff, in order to make out his cause of action, is required to show that the contract sued upon is for any reason illegal, the court should not enforce it, whether the illegality is pleaded as a defense or not; but that when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must be pleaded.[7]

[1] Corby v. Weddle, 57 Mo. 452.

[2] 82 Mo. 468.

[3] 86 Mo. 445.

[4] See a decision to the same effect by the Kansas city court of appeals, § 580, *post*, n. 5, p. 307.

[5] 108 Mo. 217.

[6] 138 Mo. 672.

[7] And the court again states this rule in McDearmott v. Sedgwick, 140 Mo. 172.

§ 578. There is one decision of the supreme court which is directly opposed to the foregoing, and which fully applies the principle announced in *Greenway v. James*, *supra*.[1] It is the case of *Sprague v. Rooney*,[2] which was a proceeding in equity to compel the specific performance of a contract for the sale of a house and lot. The defense was that the contract of sale was in effect a lease, and was put in the form of a sale in order to evade the statute forbidding the leasing of premises for a bawdy-house. The answer, however, was a general denial, and under this denial defendant sought to prove the above fact. The supreme court held that the evidence was admissible, on the ground that the effect of the general denial was to deny that there was any legal contract in existence. And the court cites among other cases that of *Greenway v. James*, and also *Young v. Glascock*,[3] which announces the same rule.

§ 579. The same lack of harmony is found in the decisions of the two courts of appeals. The question came before the St. Louis court of appeals in 1885,[4] when the court, speaking through Rombauer, J., impliedly adopts the rule laid down in the *Greenway* and *Young* cases, *supra*. There is an earlier decision of that court to substantially the same effect, it being held that where an action is brought on an indemnity bond given to the sheriff, and the answer is a general denial, accompanied with a special allegation that the property belonged to the execution debtor, it is competent to show that the sale under which the plaintiff claims was void as being in fraud of creditors.[5] In the next decision of that court, in a case coming before it in the next year,[6] the question was whether the illegality of a contract might be proved under a general denial. There the court, speaking through Lewis, P. J., repudiates the doctrine laid down in the *Greenway* and *Young* cases, or at least denies the application of that doctrine to the case in hand. He says that "the broad generality of the declaration went far beyond the question under consideration" in those cases, and that the language used in the *Greenway* case was only a *dictum*. He adds that "the authorities elsewhere are unanimous against the introduction under a general denial of evidence to prove illegality in the contract sued on as a defense against it." It will be observed that in this case[6] the

[1] 34 Mo. 326.
[2] 104 Mo. 349.
[3] 79 Mo. 574.
[4] Stern Auction Co. v. Mason, 16 App. 473.
[5] State ex rel. v. Stark, 10 App. 591. But the case is not reported in full.
[6] Cummiskey v. Williams, 20 App. 606.

question was one of proving illegality under a general denial, and not fraud, as in the case decided in 1885.[1] But in the case of *Claflin v. Sommers*,[2] decided in 1889, the question was, as in the first case, whether fraud could be shown under a general denial, and the court there, speaking again through Rombauer, J., declined to follow the *Mason* case, and held that the evidence was not admissible.[3] In the next year the case of *Carter v. Shotwell*[4] came before that court, in which also the question of proving fraud under a general denial was involved. While Judge Rombauer raises the question, he does not directly decide it, though he does say it is the better rule, where fraud is relied on as a defense, to plead it specially. In the case of *Chapman v. Currie*,[5] which was decided in 1892, the question involved was that of the illegality of a contract, and the court, speaking through Biggs, J., held that such illegality might be shown under a general denial, saying that "the effect of the answer was to deny that there was any legal contract in existence," and he cites *Sprague v. Rooney*.[6] In a case arising in 1893[7] the St. Louis court of appeals places itself squarely in line with the *Greenway* case and the cases following it, and cites with approval two decisions of the Kansas City court of appeals which are also in line with those cases, and which will be presently referred to. In the *Scudder* case,[7] Bond, J., says: "It follows, therefore, according to the definition of the issues raised by the general denial, that it was competent thereunder in this case to adduce evidence of the real character of the fraudulent trusts created by respondents, and assumed by appellant, in the issuance of the stock sued for in appellant's name." (p. 522.)

§ 580. Turning to the decisions of the Kansas City court of appeals, its first decision on the point was rendered in 1885.[8] That case involved the question of fraud upon creditors, and the court follows the cases of *Greenway v. James*[9] and *Glascock v. Young*,[10] holding that it was perfectly competent to introduce under a general denial the defense of the invalidity of the contract

[1] Stern Auction Co. v. Mason, 16 App. 473.

[2] 39 App. 419.

[3] It will be noted that the Mason case was one in replevin and the Claflin case was an interplea in an attachment case, so that the cases were identical in principle. See § 580, n. 3, on next page.

[4] 42 Mo. 663.

[5] 51 App. 40.

[6] 104 Mo. 349.

[7] Scudder v. Atwood, 55 App. 512.

[8] Tyler v. Larimore, 19 App. 445.

[9] 34 Mo. 326.

[10] 79 Mo. 574.

by reason of this fraud. (p. 458.) That case was decided by Phillips, P. J.; and in a decision rendered by him shortly afterwards he held that it might be shown under a general denial that the contract upon which plaintiff sought to recover was illegal as contrary to public policy.[1] The next case is that of *White v. Middlesworth*.[2] That was an action against a surety on a promissory note, who set up in defense that plaintiff had granted the maker of the note an extension of time, for a good consideration, without defendant's knowledge or consent. Plaintiff replied by a general denial. Defendant proved the extension, and objected to plaintiff testifying that the extension was made on the principal's representations that the defendant surety knew of, and had agreed to, the terms of the extension. It was held that the evidence tended to show that the agreement for the extension was void *ab initio* on account of the fraud and deceit of the principal in procuring it, and was admissible under the general denial. There the court makes the distinction that it is only where the contract is merely voidable, and not void, that it is necessary to plead specially the circumstances of the fraud. The language of the court is as follows: "The fraud, if established by the evidence, tended to disprove an agreement valid in law for the extension. It tended to show the agreement was void *ab initio* on account of the fraud and deceit of Beers in procuring it. The evidence in question proved that the agreement, the basis of the defense, never existed. In other words, that it was as if it had never been — nothing. Under the general denial, evidence of this character was admissible." (p. 373.) And on rehearing the court says further: "We do not doubt that a denial in general terms of the making of a contract puts in issue every fact essential to the original creation of the obligation. Under an issue so made, evidence tending to show that the contract never had any existence, or was never made, was proper." (p. 375.) In the next case it is held (the opinion being by Ellison, J.) that, in the trial of an interplea filed in an attachment case, the attachment plaintiff may, under a general denial, show that the interpleader's claim is fraudulent, and that he has therefore no title.[3] It is to be noted, however, that the decision in this case is placed upon the ground that an interplea in an attachment case is of the nature of a replevin suit; and, as will be seen hereafter, a

[1] Suits v. Taylor, 20 App. 166.
[2] 42 App. 363.
[3] First National Bank v. Kansas City Lime Co., 43 App. 561.

general denial in a replevin suit raises the question of fraud in the plaintiff's title.[1] The case of *Hardwick v. Cox*[2] involved the question of fraud as to creditors, and the court, speaking through Smith, P. J., holds that the evidence was admissible under a general denial. In the case of *Simon v. Simcox*[3] the same judge goes so far as to hold that, where the answer is a general denial, but also sets up special fraudulent acts, the evidence will not be confined to the special acts pleaded, but that under the general denial evidence is admissible relating to other frauds connected with the transaction. In an earlier case[4] the question whether fraud could be shown under a general denial presented a somewhat different aspect. Most of the preceding cases involved fraud as against creditors. The case in hand involved the fraudulent alteration of the instrument sued on. But the Kansas City court applies the same rule, holding that a fraudulent alteration of an instrument may be shown under a general denial of its execution. That court, however, refuses to extend the rule so as to cover the defense of illegality. For in *George v. Williams*,[5] which was an action to recover for professional services, defendant sought to prove under a general denial that the services were rendered in the compounding of a felony, and the court held that such a defense could not be made under a general denial.[6]

§ 581. The result of this examination leads, I think, to the conclusion that the defense of fraud may be made under a general denial, but that, where the cause of action is founded upon a contract, it cannot be shown under a general denial that the contract was illegal or contrary to public policy.[7] It may be shown in defense to an action on a writing that the signature of defendant to the writing was procured through the secret and fraudulent substitution of it in place of another writing, which the defendant supposed he was signing.[8]

[1] § 582, *post*. See also § 579, *ante*, where the Claflin and Mason cases, which stand upon a like ground, are discussed.

[2] 50 App. 509.

[3] 75 App. 143.

[4] Law v. Crawford, 67 App. 150.

[5] 58 App. 138.

[6] This is in harmony with the supreme court decision on the same point. See § 577, *ante*, n. 3, p. 303.

[7] This rule, as to proving illegality and kindred defenses, is the one laid down in St. Louis Agr. & Mech. Ass'n v. Delano, 108 Mo. 217; Kansas City School District v. Sheidley, 138 Mo. 627, and McDearmott v. Sedgwick, 140 Mo. 172.

[8] Kingman v. Shawley, 61 App. 54. See also § 588, *post*.

That in an action of ejectment it may be shown that a deed offered in evidence was obtained by fraud, see *post*, § 596.

§ 582. **Fraud or illegality — Actions in replevin.**— In the action for the claim and delivery of personal property, known at common law as an action of replevin, it is beyond question the rule that defendant may, under a general denial, assail the plaintiff's title for fraud. This question first came before the supreme court at a date anterior to the adoption of the practice act. The case of *Gibson v. Mozier*[1] was tried under a statute which provided that in such cases defendant might plead "not guilty," and that such plea should put in issue not only the right of the plaintiff to the possession of the property but also the wrongful taking and detention. It was held, Scott, J., delivering the opinion, that if the right of possession is put in issue it is hard to imagine a reason why evidence tending to show that the deed under which plaintiff claims is fraudulent as against creditors, and therefore void, is not admissible under that issue. In *Bosse v. Thomas*[2] the question of showing fraud did not arise, but the reasoning of the court necessarily leads to the conclusion that defendant would be permitted, under a general denial, to show that plaintiff's title was void by reason of fraud, it being held that under such a plea any evidence is admissible on the part of defendant which goes to show that plaintiff has neither property nor right of possession, and that evidence of title in a stranger is admissible. In *Young v. Glascock*[3] the defense proved was that the title of plaintiff was only colorable, and was void as to the creditors of the pretended vendor, and this proof was held to be admissible under a general denial. "In the action of replevin," says Phillips, C., "as in that of ejectment, where the pleading on the part of plaintiff is a general averment of ownership of the property and a consequent right of possession, any proof on the part of defendant which goes to show that the plaintiff at the time of the institution of the suit was not the actual owner, and was not entitled to the possession thereof, is admissible under the general issue, even though it extend to the proof of fraud in the acquisition of plaintiff's title, or that the ownership and right of possession were in a third party." (p. 576.)[4] In a case involving facts in many respects quite similar to those of *Young v. Glascock*,[3] the St. Louis court of appeals follows that decision.[5]

[1] 9 Mo. 256.
[2] 3 App. 472.
[3] 79 Mo. 574.
[4] The doctrine is again stated in Springer v. Kleinsorge, 83 Mo. 152.
[5] Stern Auction Co. v. Mason, 16 App. 473.

§ 583. In *Eidson v. Hedger*[1] the plaintiff made a conditional sale of cattle to one Alley, under an oral agreement that the title should remain in plaintiff until the purchase-money was paid, which agreement was void under the Missouri statute. Alley sold to defendant and, when the cattle were replevied by plaintiff, defendant interposed a general denial. The court held that under this plea defendant might assail plaintiff's title for fraud, and show such facts as would under the law render such title void and ineffective as against the defendant.[2] This is the settled law in this state, and the principle upon which it rests is announced in *Oester v. Sitlington*,[3] *Westbay v. Milligan*,[4] and *Advance Thresher Co. v. Pierce*.[5] In the supreme court case just cited,[3] Judge Macfarlane says that in an action of replevin a general denial puts in issue the plaintiff's right to the possession of the property at the commencement of the action, and every collateral fact necessary to the establishment of the same. (p. 257.)[6]

§ **584. Agency.**— Where an action is brought for the purchase price of personalty sold by a person, who in point of fact acted as the agent of plaintiff, and the defense is that the agency was not disclosed, and that defendant had in good faith treated the agent as a principal and paid the money to him, such defense should be specially pleaded; it cannot be shown under a general denial.[7] If in an action by a real-estate agent to recover his commissions the defense is that the plaintiff, without defendant's knowledge and consent, acted as agent for both parties in the transaction, this defense must be affirmatively pleaded.[8]

§ **585. Alteration.**— Proof that after the signing of a promissory note, but before its delivery or the attaching of any liability, it was materially altered without the consent of the signer, is admissible under a general denial.[9]

§ **586. Assignment.**— If an action is brought upon an account which has been assigned by the plaintiff, a general denial will impose upon the plaintiff the burden of proving both the account

[1] 38 App. 52.

[2] The same view is taken in Christy v. Scott, 31 App. 331.

[3] 115 Mo. 247.

[4] 74 App. 179.

[5] 74 App. 676.

[6] In ejectment plaintiff's title may be shown to be fraudulent under a general denial. See § 596, *post*. But the defense of innocent purchaser for value cannot be shown under a general denial. See § 614, *post*.

[7] Hutchinson Mfg. Co. v. Henry, 44 App. 263.

[8] Reese v. Garth, 36 App. 641.

[9] National Bank v. Nickell, 34 App. 295. See § 590, *post*.

and its assignment; but where defendant sets up the special defense that he did not purchase the articles of plaintiff, but of another party to whom he had paid the bill, this admits both the correctness of the account and the fact of the assignment.[1]

§ 587. **In actions on bills and notes.**— In an action to recover the reasonable value of merchandise sold to defendant, the latter may prove under a general denial that he had given to a third party a draft on plaintiff, and that plaintiff had promised when the draft was presented to pay it, that he had requested time and had ultimately failed to pay the draft, and that at the same time the plaintiff had stated that he was indebted to defendant five or six hundred dollars, and that their business was unsettled.[2] Where the defendant is sued as an individual on a promissory note which he signed as president of a corporation, he may under a general denial prove that the note was executed by him solely for the benefit of the corporation and for its debt.[3]

§ 588. **In actions on bonds.**— A plea of *non est factum* puts in issue only the execution of the bond.[4] Defendant cannot show under that plea that the bond sued on was a stake to be put up by him against a similar bond by the plaintiff as a wager upon the result of an election. Such a defense must be specially pleaded.[5]

§ 589. **In actions against carriers.**— Where in an action by a passenger for being ejected from a railroad train the petition alleges that plaintiff entered the train by virtue of a round-trip ticket from one station to another and return, defendant may show under a general denial that by the rules and regulations of the company plaintiff had no right to enter that particular train under such a ticket, and that he was so informed by defendant's agent when the ticket was purchased; it is not necessary that defendant should set forth in its answer the rules and regulations of the company governing such matters.[6] Where the action is for non-delivery of goods intrusted to the carrier for transportation, defendant cannot show under a general denial that its liability as a carrier had terminated, and that the goods were destroyed by fire while defendant was holding them

[1] Bond v. Long, 87 Mo. 266.

[2] Hayden v. Herndon, 9 Mo. 864.

[3] Turner v. Thomas, 10 App. 338.

[4] State to use v. Ferguson, 9 Mo. 285.

[5] Stapleton v. Benson, 8 Mo. 13. For the rule in actions on official bonds, see § 610, *post*.

[6] Logan v. Hannibal & St. J. R. Co., 77 Mo. 663. This decision virtually overrules Hicks v. Hannibal & St. J. R. Co., 68 Mo. 329.

as warehouseman.[1] If a connecting carrier desires to avail itself of the benefits of limitations contained in the contract with the receiving carrier, it must specially plead such limitations.[2] Where the action was for an injury to cattle by a stampede, and a bill of lading, which was made and delivered after the stampede, contained a release of all causes of action, such release is not admissible under a general denial, since it could only support a confession and avoidance.[3]

§ 590. **In actions on contracts.**— Want of consideration may be shown under a general denial.[4] A denial in general terms of the making of a contract puts in issue every fact essential to the original creation of the obligation.[5] If an instrument is void *ab initio*, and not merely voidable, the plea of *non est factum* is proper, and facts showing the instrument to be void may be given in evidence to sustain such plea.[6] The defendant is always at liberty to disprove and overthrow a contract asserted against him by proving that it was materially different from the one so asserted.[7] It is competent under the general denial to show that the contract was conditional, and that the condition has not been fulfilled.[8]

§ 591. In an action on an insurance policy, if there is an allegation in the petition that plaintiff has complied on his part with all the conditions of the policy, a general denial will not raise matters of defense depending on the terms of the contract.[9] If the action is for breach of a verbal agreement, defendant cannot under the general denial introduce a subsequent written agreement to defeat the action.[10] And in an action on a written contract, evidence will not be received to vary the terms of the contract; to render such evidence admissible the answer must plead the subsequent modification of the written contract, especially if it goes to defeat plaintiff's cause of action.[11] If defendant

[1] Pindell v. St. Louis & Han. R. Co., 34 App. 675.

[2] Halliday v. St. Louis, Kansas City & N. R. Co., 74 Mo. 159.

[3] Cooke v. Kansas City, Ft. S. & M. R. Co., 57 App. 472. Consult also § 609, *post*.

[4] Block v. Elliott, 1 Mo. 275.

[5] Cavender v. Waddingham, 2 App. 551; White v. Middlesworth, 42 App. 368; Northrup v. Ins. Co., 47 Mo. 435. The question whether this includes the defenses of fraud and illegality is discussed in §§ 577–583, *ante*.

[6] Law v. Crawford, 67 App. 150.

[7] Wilkerson v. Farnham, 82 Mo. 672; Clemens v. Knox, 31 App. 185. See § 585, *ante*.

[8] Stewart v. Goodrich, 9 App. 125.

[9] Hester v. Fidelity & Casualty Co., 69 App. 186.

[10] Harrison v. Mo. Pac. R. Co., 74 Mo. 364; Hoskins v. Mo. Pac. R. Co., 19 App. 315.

[11] Phister v. Gove, 48 App. 445.

relies on an estoppel or a subsequent modification of the contract sued on, he must plead it, since neither defense can be shown under a general denial.[1] Nor can defendant under a general denial avail himself of the defense that the contract has been rescinded.[2] And this rule applies to an action by a vendor against the vendee to recover the purchase-money.[3] If a special custom is relied upon to take the case out of the general rules of law, it cannot be shown under a general denial.[4]

§ 592. **Showing that the contract is void under the statute of frauds.**— It was held before the adoption of the Code that it was not necessary to plead the statute of frauds as a defense, where plaintiff's pleading did not show whether or not the contract was in writing, but that it could be shown under the general issue that the contract was within the statute and that it was not in writing.[5] And the rule has been followed since the adoption of the Code.[6] The two cases cited were suits for specific performance. But *Springer v. Kleinsorge*[7] was an action at law to recover the amount of a bid at an auction sale of land, and there, too, it was held that the question whether the contract was in writing, as required by the statute of frauds, might be raised under a general denial. *Allen v. Richard*[8] was also an action at law, and there was the same ruling on this question. It is now recognized as the settled rule in this state that in all proceedings, whether actions at law or suits in equity, unless the contract is admitted, a general denial is sufficient to raise the issue that the contract is void because within the statute of frauds and not in writing.[9] The rule applies to the case of a sale; but, of course, if in such a case the delivery of the goods is admitted, the statute of frauds has nothing to do with the case.[10] It is said in *Hurt v. Ford*[11] that where plaintiff in her replication denies all the allegations of the answer, except as to the facts alleged in the petition, the effect of such reply was to

[1] Tyler v. Tyler, 78 App. 240.

[2] Riggins v. Missouri River, F. S. & G. R. Co., 73 Mo. 598; Brown v. Weldon, 27 App. 251.

[3] Reynolds v. Reynolds, 45 App. 622.

[4] Hayden v. Grillo, 42 App. 1.

The rule in an action on a lease will be found in § 603, *post*.

[5] Wildbahn v. Robidoux, 11 Mo. 659.

[6] Hook v. Turner, 22 Mo. 333.

[7] 83 Mo. 152.

[8] 83 Mo. 55.

[9] Boyd v. Paul, 125 Mo. 9; Miller v. Harper, 63 App. 293; Hackett v. Watts, 138 Mo. 502; Porter v. Citizens' Bank, 73 App. 513; State ex rel. v. Cape Girardeau Waterworks Co., 74 App. 273; Hillman v. Allen, 145 Mo. 638. The few cases in which the contrary has been held, of which Gordon v. Madden, 82 Mo. 193, is an instance, do not correctly state the law.

[10] Graff v. Foster, 67 Mo. 512.

[11] 142 Mo. 283.

deny that plaintiff ever promised defendants that, if they would become sureties on a note of her brother-in-law, she would pay the note at its maturity, and otherwise hold them harmless. And as that alleged contract was merely oral, and therefore within the statute of frauds, the plea of the statute as a bar to this defense was as well raised by the denial as it would have been by a special plea. The rule above announced obtains where the petition prays for specific performance, or, if that be not decreed, then for damages for a failure to perform the contract.[1]

§ **593. Showing custom.**— If a special custom is relied upon to take the case out of the general rules of law, it cannot be shown under a general denial.[2]

§ **594. Proving damages.**— The question what damages may be proved under a general denial is considered in section 613, *post.*

§ **595. In actions of ejectment.**— Where in an action of ejectment defendant's plea is a general denial, he may show title in himself by proving that he purchased the property at sheriff's sale under a judgment and execution against the plaintiff.[3] He may offer in evidence the proceedings of the probate court which show title in himself.[4] He may show that he is holding possession under an agreement fixing a permanent boundary line.[5] If plaintiff claims under the purchase by a husband of a title adverse to his wife, defendant may show that such purchase inured to her benefit.[6] In an action by one tenant in common against another, the ouster is admitted by a general denial; but the admission does not extend to the date of the ouster as it is alleged in the petition.[7] Where the answer is a general denial, plaintiff may rely on any title which the evidence in the case may disclose.[8]

§ **596. Same — Attacking deed for fraud.**— In the action of ejectment, where either party offers in evidence a deed in the chain of evidence, the adversary may attack it for fraud, though a court of equity would have jurisdiction to set it aside; and it necessarily follows that under a general denial the defendant may attack for fraud or on any other ground any deed in the chain of plaintiff's title.[9]

[1] Devore v. Devore, 138 Mo. 181.
[2] Hayden v. Grillo, 42 App. 1.
[3] Davis v. Peveler, 65 Mo. 189.
[4] Macey v. Stark, 116 Mo. 481.
[5] Jacobs v. Moseley, 91 Mo. 462; Schad v. Sharp, 95 Mo. 574; Atchison v. Pease, 96 Mo. 566.
[6] Hickman v. Link, 97 Mo. 482.
[7] La Riviere v. La Riviere, 77 Mo. 512.
[8] Porter v. Gaines, 151 Mo. 560.
[9] Christy v. Scott, 31 App. 331.

**§ 597. Same — Showing that deed is an escrow.** — It is a familiar principle that a deed delivered as an escrow has no force until the condition is performed, and that even if the grantee should get such a deed into his possession, while still subject to the condition, he could derive no benefit from it. Hence, defendant may, under a general denial, show that the deed under which plaintiff claims was originally delivered as an escrow, and that the condition had never been performed.[1]

**§ 598. Same — Action by pretermitted heirs.** — Where an action in ejectment is brought by pretermitted heirs, the defense that plaintiffs have received advancements and that defendant has made improvements must be pleaded; these facts cannot be shown under a general denial.[2]

**§ 599. Same — Where title comes through deed of trust.** — Where the title comes through a sale under a deed of trust, and such sale is not made at the place described in the deed of trust, it will still pass the legal title, and a deed under such sale will be a good defense as an outstanding title, and may be interposed under a general denial in an ejectment brought by a purchaser at a subsequent foreclosure sale under the same deed of trust, even against the grantor in the deed of trust. And where the plaintiff relies upon a purchase at a sale under a deed of trust, the defendant cannot under the general denial show that the sale was not made at the place designated in the deed of trust.[3] Where the action is brought by a purchaser under a deed of trust against the grantor in the deed of trust, and the answer is a general denial without any offer to redeem, defendant cannot show that the sale was made at the request of the purchaser and that he was not the legal holder of the note. Defendant might have offered to redeem, and upon performance his possession would have been protected and he would have been reinvested with the title; but failing to make such offer, the only issue was the legal title, and this passed by the sheriff's deed.[4]

**§ 600. Same — Outstanding equities.** — Under a general denial in an action of ejectment the court will not consider any outstanding equities.[5] But if plaintiff was a purchaser at a sheriff's sale, and the answer sets out a prior decree in partition and a deed to defendant made pursuant thereto, and prays for a find-

[1] Goff v. Roberts, 72 Mo. 570.

[2] McCracken v. McCracken, 67 Mo. 590.

[3] Schanewerk v. Hoberecht, 117 Mo. 22. This case overrules many earlier decisions of the supreme court.

[4] Biffle v. Pullam, 125 Mo. 108.

[5] Hall v. Gregg, 138 Mo. 286.

ing for the latter and a decree declaring him to be the owner of the property, and for such other orders, judgments and decrees as shall be right and proper, it states only such facts as might be given in evidence under a general denial.[1] So where the answer admitted possession of the premises, but denied the other allegations of the petition, and then gave a history of the deeds by which plaintiff claimed to have obtained his title, followed by averments that defendant had paid off and discharged certain incumbrances, that the deed to plaintiff was without consideration, made for the purpose of defrauding defendant, and was a cloud upon his title, and the prayer was that the deed to plaintiff be declared void, that the title of the property be vested in defendant, and that plaintiff and those claiming under him be forever enjoined from asserting title, and for general relief, it was held that there was no fact pertinent to the issues which could not be given in evidence under the general issue.[2]

§ **601. In an action for homicide.**— In an action by a widow for the killing of her husband under circumstances which amounted to homicide, defendant may, under a general denial, give evidence tending to show that he acted in self-defense.[3]

§ **602. The issue of infancy.**— Where the petition is brought by an infant by his guardian or next friend, the allegations that the plaintiff is an infant, and that the one purporting to be his guardian or next friend has been duly appointed as such, are issuable facts, but the issue cannot be raised by a general denial.[4]

§ **603. In actions between landlord and tenant.**— Where a landlord brings an action for a breach of the covenants of a lease, charging that the tenant has failed to pay rent according to a modification of the lease, and the answer is a general denial, this casts upon plaintiff the burden of establishing the lease, the modification and the breach, and that he had performed all the conditions of the lease to be performed by him, and defendant would be permitted to show that he had paid the rent; but if he relies upon any new matter going to avoid the action, he must specially plead it.[5]

§ **604. Showing a bar by limitation.**— Both at common law and under the Code the defense of the statute of limitations must be raised by answer, except where the statute confers title, in

[1] Hart v. Steedman, 98 Mo. 452.
[2] Thummel v. Holden, 149 Mo. 677.
[3] Nichols v. Winfrey, 79 Mo. 545.
[4] Randolph v. Hannibal & St. J. R. Co., 18 App. 609.
[5] Evers v. Shumaker, 57 App. 454.

which case it becomes available under a general denial.[1] And the action of ejectment comes within the exception above stated.[2] The reason of this exception is that the statute operates directly upon the right to the land and vests title in the adverse possessor; hence a denial of the title opens up the question of the acquirement of title by defendant by reason of the adverse possession.[3] It will be seen from an examination of the above cases that the rule operates also in favor of the plaintiff, and that he may show under a general allegation of right to possession that he has acquired the title by limitation. In such actions it is neither necessary to plead the general statute, nor the special statute which formerly applied to tax deeds.[4] In like manner the special thirty-year statute[5] may be availed of as a defense without being specially pleaded.[6]

§ 605. **Avoiding plea of the statute of limitations.**— When the answer sets up the statute of limitations and plaintiff relies on matter in avoidance of the plea, he must plead it specially; such facts cannot be shown under a general denial.[7] And where an acknowledgment in writing is relied upon to save the debt from the bar of the statute, such acknowledgment must be pleaded.[8]

§ 606. **In actions for malicious prosecution.**— In an action for malicious prosecution the defendant may under a general denial show that he acted in good faith upon the advice of counsel.[9] It has been held in actions for trespass that, while the burden of proving probable cause rests upon the defendant, yet he need not set up in his answer that he had probable cause.[10] And I apprehend that the same rule would be held to apply to actions for malicious prosecution.

§ 607. **In actions between employer and employee.**— The defense that personal injuries for which the action is brought

[1] Benoist v. Darby, 12 Mo. 196; Bell v. Clark, 30 App. 224; Orr v. Rode, 101 Mo. 387; Stoddard County v. Malone, 115 Mo. 508; Maddox v. Duncan, 62 App. 474.

[2] Campbell v. Laclede Gas Light Co., 84 Mo. 352.

[3] Nelson v. Brodhack, 44 Mo. 596; Fulkerson v. Mitchell, 82 Mo. 13; Holmes v. Kring, 93 Mo. 452; Stocker v. Green, 94 Mo. 280; Bledsoe v. Sims, 53 Mo. 305; Hill v. Bailey, 76 Mo. 454; Coleman v. Drane, 116 Mo. 387.

[4] Bird v. Sellers, 113 Mo. 580.

[5] Rev. Stat. 1899, sec. 4268.

[6] Fairbanks v. Long, 91 Mo. 628.

[7] Moore v. Granby Mining Co., 80 Mo. 86.

[8] Zoll v. Carnahan, 83 Mo. 35.

[9] Sparling v. Conway, 75 Mo. 510.

[10] Walther v. Warner, 26 Mo. 143; Brown v. Carter, 52 Mo. 46.

were caused by the negligence of a fellow-servant of the plaintiff is available without being specially pleaded.[1]

**§ 608. In mechanics' lien suits.**— In an action to enforce a mechanic's lien, where the petition alleges among other things that the material was used in the construction of the building, a general denial of any knowledge or information sufficient to form a belief as to the truth of the facts stated in the petition puts in issue this allegation.[2] All the facts necessary to constitute the lien must be specifically denied or they stand admitted; and if the answer contains simply a denial that the claim constitutes a lien on the land, this puts in issue only the liability of the land to the charge.[3] If defendant relies upon a special contract between him and plaintiff, he must set up such contract and the breach of it as a special defense; such defense cannot be shown under a general denial.[4]

**§ 609. In actions for negligence.**[5]— In an action based upon negligence by which property or the person is injured, the fact that the injury results from the negligence of the defendant is put in issue by the general denial; but contributory negligence must be specially pleaded.[6] In an action against a railroad company for the death of a passenger, the negligence alleged was the want of care on the part of the company's employees, and defects in its road. The defendant denied all the allegations of the petition, and also filed a special plea alleging that the road was well constructed, the employees skilful and careful, but that the casualty was caused by an extraordinary storm. It was held that all this matter could be shown under the general denial, and therefore the special plea was properly stricken out.[7] In an action for the death of an employee the petition charged that the deceased was employed by defendant, and that he was killed by the breaking of a scaffold constructed out of defective lumber which defendant furnished. The answer averred contributory negligence on the part of the deceased, in that he constructed the scaffold out of lumber selected by himself from the lumber

[1] Sheehan v. Prosser, 55 App. 568. See also § 609, n. 1, p. 318.

For liability of employer for acts of employee, see § 616, *post.*

[2] Schulenberg v. Prairie Home Institute, 65 Mo. 295. But see case cited in next note.

[3] Fitzpatrick v. Thomas, 61 Mo. 515.

[4] Meyer v. Broadwell, 83 Mo. 571.

[5] This subject is also incidentally discussed in § 553 *et seq.*, *ante.* See also §§ 589 and 607, *ante*, and § 613, *post.*

[6] Donovan v. Hannibal & St. J. R. Co., 89 Mo. 147; Young v. Kansas City, 27 App. 101.

[7] Ellet v. St. Louis, K. C. & N. R. Co., 76 Mo. 518.

furnished by defendant. A reply to this answer by way of general denial puts in issue not only the fact of such selection, but also whether such selection was a duty within the scope of the employment of the deceased, and his competency to perform it.[1] It may be shown that a third party caused the injuries sued for.[2]

§ 610. **Action against officer.**— Where an action of trespass is brought against a constable, and he desires to defend on the ground that the goods were seized by him under execution, and that an indemnity bond had been given by the plaintiff in such execution, these facts should be affirmatively pleaded, since they cannot be submitted to the jury by instructions under a general denial.[3] In an action brought on a constable's bond for fees which it was alleged the defendant collected as constable, and refused to pay over to plaintiff, the justice of the peace, the evidence showed the collection of the fees, and plaintiff denied that they had been paid over. Under the general denial defendant offered to show full payment, but was not permitted to do so. This was held by the supreme court to be error, since, in order that plaintiff should recover, it was necessary for him to prove not only the collection of the fees by the constable, but that demand of payment had been made on him and that such demand was refused, and each of these issues was met by the general denial.[4]

§ 611. **Payment or tender.**— It is the well settled law of this state that payment is an affirmative defense, and hence that it cannot be proved under a general denial.[5] There may be cases in which the fact of non-payment is a fact to be proved in order to sustain the plaintiff's *prima facie* cause of action. But as a general thing, in ordinary money demands, the fact of payment is in the nature of new matter, and inadmissible by our code under a simple denial.[6] And the court adds that both the logic of principle and the weight of authority lead to this result. One exception is where the fact of non-payment is stated in the petition as a necessary and material averment constituting the cause of action, in which case a general denial will be sufficient to permit the defendant to show payment.[7]

[1] Boettger v. Scherpe Iron Co., 127 Mo. 87. See also § 607, *ante*.

[2] Young v. Kansas City, 27 App. 101.

[3] Palmer v. Shenkel, 50 App. 571. See also § 621, *post*.

[4] State ex rel. v. Peterson, 142 Mo. 526.

[5] Henderson v. Davis, 74 App. 1.

[6] Wilkerson v. Farnham, 82 Mo. 672.

[7] State ex rel. v. Peterson, 142 Mo. 526. The facts of this case are given in § 610, *ante*.

§ 612. Defendant made his negotiable promissory note to W, who indorsed it to B, who brought an action on it and then transferred it to plaintiff, who was then substituted as plaintiff in the place of B. The answer was a general denial, and in addition a cross-petition in which it was alleged that B was indebted to the defendant in the amount of $300 for rent of a cheese factory. Under this answer, evidence going to show various cash payments was held to be inadmissible; and evidence to show an agreement that the rent of the cheese factory was to be applied on the note was likewise inadmissible.[1] Where the drawer of a check brings an action against a bank for conversion of the sum for which it is drawn, the bank may show that the check was properly paid to the holder of it, though it does not specially plead such payment in its answer.[2] When in an action on a promissory note the defendant sets up a tender as a defense, if plaintiff relies on a subsequent demand and refusal, he must set it up in his reply, as he cannot prove it under a general denial.[3]

§ **613. In actions for personal injuries.**— Where the action is for damages on account of personal injuries, defendant may show under a general denial that the injuries were caused by a third person.[4] All evidence in mitigation of the damages is admissible under a general denial.[5] And defendant may show any acts of the plaintiff tending to enhance his injuries, whether such acts are to be considered in mitigation of, or as limiting, the damages. Thus it may be shown that the damages were increased by plaintiff's continued use of intoxicating liquors.[6]

§ **614. Purchaser for value.**— In a proceeding in equity to set aside a sale made under a deed of trust, if the defendant desires to raise the issue that he was a purchaser for value and in good faith, he must plead it as an affirmative defense, and cannot raise it under a general denial.[7] Where a wife brings an action to recover money which her husband has stolen from her and delivered to defendant, if plaintiff assails the good faith of the defendant, the latter may show that he received the money in good faith, without pleading it.[8]

[1] Hyde v. Hazel, 43 App. 668.

[2] Albers v. Commercial Bank, 85 Mo. 173.

[3] Mahan v. Waters, 60 Mo. 167.

[4] Young v. Kansas City, 27 App. 101.

[5] Beck v. Dowell, 40 App. 71.

[6] Boggess v. Metropolitan St. R. Co., 118 Mo. 328.

[7] Holdsworth v. Shannon, 113 Mo. 508.

[8] Courtial v. Lowenstein, 78 App. 485.

The rule as to showing fraud under a general denial is discussed in § 577 *et seq., ante.*

§ 615. **In a proceeding to quiet title.**— In a proceeding under the statute to quiet title,[1] if the answer is a general denial, the only issue raised is that of plaintiff's possession. If defendant claims that he has title to the land, he must by his answer show cause why he should not be required to bring an action to try such title; and unless he does this affirmatively the existence of such cause is not in issue.[2]

§ 616. **In actions against railroad company.**— Where the action is for the killing of stock by a locomotive which was being run without a train, the defendant company may show under a general denial that the locomotive was being used by one of the employees of the company for his own purposes, outside of the line of his employment, and without the knowledge of, or authority from, the company.[3]

§ 617. **In replevin.**— The action of replevin in many respects bears a strong resemblance to that of ejectment. It involves the right of property and the possession. The form of pleading is much the same. Neither party can know from the form of the pleadings on what claim of title, or line of proof, the case will depend and proceed. In the action of ejectment, where either party offers in evidence a deed in the chain of evidence, the adversary may attack it for fraud, although a court of equity would have jurisdiction to set it aside.[4] So in the action of replevin, the defendant under the general issue may assail the plaintiff's title under a deed or bill of sale for fraud, and show the facts which in equity would make it void.[5] For in replevin defendant may under a general denial show anything which tends to disprove the title or right of possession of plaintiff.[6] He may show that the instrument under which the plaintiff claims the property is fraudulent and void.[7] He may show that he himself holds the goods under legal process against the true owner,[8] or that the goods in controversy are the property of a third person, held by the defendant as sheriff under a writ of attachment, and that plaintiff's claim is merely colorable.[9] If the property replevied

[1] Rev. Stat. 1899, sec. 647 *et seq.*

[2] Murphy v. De France, 23 App. 337.

[3] Cousins v. Hann. & St. Jos. R. Co., 66 Mo. 572. Consult also §§ 609, 613, *ante*.

[4] See § 596, *ante*.

[5] Christy v. Scott, 31 App. 331, 339.

[6] Gibson v. Mozier, 9 Mo. 256; Stern Auction & Com. Co. v. Mason, 16 App. 473; Pugh v. Williamson, 61 App. 165.

[7] Gibson v. Mozier, 9 Mo. 256; Young v. Glascock, 79 Mo. 574; Stern Auc. & Com. Co. v. Mason, 16 App. 473.

[8] Bosse v. Thomas, 3 App. 472.

[9] Young v. Glascock, 79 Mo. 574.

was purchased at a sale under a deed of trust, the invalidity of the deed of trust may be shown under a general denial.[1]

§ 618. A general denial is sufficient to put the plaintiff to the proof of his title or right to the possession, though the answer contains no averment of title in the defendant or in a stranger.[2] In that case the defendant was permitted to show that his wife was co-tenant with the plaintiff in respect to the ownership of the property, and that at the time the writ was sued out defendant held the title under his wife and for her use.[3] Notwithstanding the statute which makes void as to third parties a conditional sale not evidenced by a writing put on record,[4] such sale is valid as between the parties; the owner may place such conditions upon its sale as he pleases, and such conditions will be enforced as against his vendee. But, though the conditions are made, yet they may be waived by the vendor, and are waived by an unqualified and unconditional delivery of the goods. Therefore in an action of replevin brought by the vendor, defendant may show under a general denial that such conditions were waived, since that plea puts in issue the plaintiff's right to the possession of the property at the commencement of the action.[5] It is not necessary in an action of replevin to raise by a plea in abatement the question of non-joinder of parties plaintiff, but advantage may be taken of the defect under a general denial, since the proof that other parties are interested in the title tends directly to disprove the right of plaintiff to the possession.[6]

[1] Fischer v. Johnson, 51 App. 157.

[2] Pulliam v. Burlingame, 81 Mo. 111.

[3] There is an earlier decision of the supreme court, which is cited in the case just mentioned, as authority for the conclusion there reached, although I confess I am unable to see that it is such authority. The case is that of Gray v. Parker, 38 Mo. 160, where there is in the opinion of Wagner, J., an extract from Greenleaf on Evidence to the effect that where *non cepit* is pleaded plaintiff's title is admitted, but it is incumbent on him to prove that the defendant had the goods; but that where the issue raises the question of title it devolves on the plaintiff to prove that at the time of the caption he had a general or special property in the goods, and the right of immediate and exclusive possession. But as the Code recognizes no such plea as *non cepit*, and as nothing is said in the opinion as to the effect of the general denial under the Code, the decision cannot be considered as settling any principle involved.

[4] Rev. Stat. 1899, sec. 3412.

[5] Oester v. Sitlington, 115 Mo. 247.

[6] Upham v. Allen, 76 App. 206; Pulliam v. Burlingame, 81 Mo. 111.

Under § 582, *ante*, it is shown that, under the general denial in an action

§ 619. **In cases of sale.**— Where the action is to recover the price of a specific lot of grain which plaintiff claims to have sold to defendant, and the answer is a general denial, since plaintiff must make out not only the sale but also the delivery of the grain, defendant may, under such denial, give evidence of anything which would tend to disprove either of those facts. Thus, he may show that the wheat which he bought was good wheat, while the wheat delivered to him by plaintiff was spoiled and damaged.[1] So, too, in an action for the purchase price of chattels, it may be shown under a general denial that the chattels were a gift, since proof of a gift disproves the allegation of a sale.[2]

§ 620. **In actions on tax-bills.**— In an action on a special tax-bill the defendant must plead specially any fact which he relies upon to defeat the legality or extent of the charge, as that the work was not properly authorized, or that it was imperfectly executed; a general denial puts in issue only those allegations of the petition which the statute makes essential to a recovery.[3] A provision in a city charter permitting a defendant to plead in reduction or defeat of the tax-bill any mistake or error in its amount, or the fact that the work was not done in a good and workmanlike manner, is a beneficial provision for the protection of the taxpayer, who may or may not interpose such defense.[4] If the statute requires that plaintiff must file a notice of suit, defendant cannot under a general denial prove the failure to file such notice. The fact that the notice has been filed as required constitutes no part of plaintiff's case, and if defendant desires to raise the question he must specially plead it.[5] An action on a special tax-bill is clearly an action founded in contract, and is not one on a *quantum meruit*. If, therefore, defendant pleads the general issue, this goes to the very foundation of the plaintiff's cause of action and is designed wholly to defeat it, and not simply to reduce the amount of the recovery.[4]

§ 621. **In actions for trespass.**— In an action of trespass *quare clausum fregit* a general denial does not put the title in issue.[6]

of replevin, evidence is admissible to prove that plaintiff's title is void by reason of fraud.

[1] Montgomery v. Gann, 51 App. 187.

[2] Blatz v. Lester, 54 App. 283.

[3] Vieths v. Planet Co., 64 App. 207; Carthage v. Badgley, 73 App. 123.

[4] Traders' Bank v. Payne, 31 App. 512.

[5] Menefee v. Bell, 62 App. 659.

[6] Schergens v. Wetzell, 12 App. 596.

Where defendants are sued jointly with a constable in trespass *de bonis asportatis*, they cannot under a general denial set up the defense that they were acting as a *posse* to the constable in levying an execution, since such fact, if it constitutes a defense at all, must be affirmatively pleaded.[1] Though the burden of proving probable cause in an action for trespass rests on the defendant, yet it is not necessary that he should set it up in his answer.[2]

[1] Palmer v. Shenkel, 50 App. 571. [2] Brown v. Carter, 52 Mo. 46.

## CHAPTER XXIII.

### NEW MATTER IN THE ANSWER.


§ 622. Pleading new matter.
623. Mode of pleading it.
624. Defenses which do not constitute new matter.
625. The defense of illegality.
626. Confession and avoidance.
627. Facts occurring after the institution of the suit.
628. Cross-bill.
629. Cross-bill between defendants.


**§ 622. Pleading new matter.**— Intimately connected with the subject of a general denial, and what may be shown under such a pleading, is the subject of pleading new matter. The rule is that whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set out in ordinary and concise language such facts, or he will be precluded from giving evidence of them on the trial.[1] Such an affirmative defense will not avail defendant unless he pleads it, though it is disclosed by the evidence; and in such case a finding that there was no such defense on the evidence cannot be complained of by defendant.[2] Thus, in order to prove a payment, or a failure of consideration, or any other fact supervening since the making of the instrument sued on, defendant must plead such fact specially, since such defenses constitute new matter.[3] In actions such as slander and malicious prosecution, mitigating circumstances are new matter and must be pleaded.[4] Where in an action by an employee defendant seeks to show that the employee has waived the performance of a duty by the employer, or that the employee has assumed certain obvious risks, such matters are affirmative defenses, and must be pleaded as such.[5]

[1] Northrup v. Miss. Valley Ins. Co., 47 Mo. 435; Kersey v. Garton, 77 Mo. 645; Hudson v. Wabash W. R. Co., 101 Mo. 13; Flint-Walling Mfg. Co. v. Ball, 43 App. 504.

[2] Schwartz Com. Co. v. Vanstone, 62 App. 241. The rule as thus broadly stated does not apply to contributory negligence, if it appears from plaintiff's own evidence. See the cases collated in 3 Pattison's Digest, NEGLIGENCE, 554–558.

[3] Smith v. Rembaugh, 21 App. 390.

[4] Buckley v. Knapp, 48 Mo. 152; Degenhart v. Schmidt, 7 App. 117.

[5] McMullen v. Missouri, K. & T. R. Co., 60 App. 231.

**§ 623. Mode of pleading new matter.**—An affirmative defense must be as clearly and distinctly set forth in ordinary and concise language as is required in stating a cause of action in a petition.[1]

**§ 624. Defenses which are held not to constitute new matter.**— In an action on a bond given by an agent for the faithful performance of his duties, the breach of the bond alleged was that the agent had failed to account truly as to the subject-matter of his agency. Defendant offered evidence tending to show that a full adjustment of all matters relating to the agency had been had; that the agent had paid a portion of the balance found against him in money and had given his note for the remainder. Since this evidence tended to show that there had been no breach, the facts disclosed thereby were not such as to constitute new matter, and they were properly admitted in evidence though not specially pleaded.[2] If, in an action for breach of the covenants in a deed, the answer alleges the existence of good title in the defendant at the time of the conveyance, such allegation is but an argumentative denial of the allegations of the petition, and in no sense new matter.[3]

**§ 625. The defense of illegality.**— If the plaintiff, in order to make out his cause of action, is compelled to show that the contract upon which he sues is illegal, such contract should not be enforced, whether defendant sets up the illegality as a defense or not. But if the illegality does not appear from the contract itself, and is not shown from the evidence by which plaintiff is required to prove it, but depends upon extraneous facts, such defense is new matter and must be pleaded in order to be available.[4]

**§ 626. Confession and avoidance.**— It may be stated, as a general rule, that an answer setting up new matter by way of defense should confess and avoid the plaintiff's cause of action.[5] And it is, therefore, generally true that a party cannot traverse and at the same time confess and avoid the same allegations.[6]

[1] Flint-Walling Mfg. Co. v. Ball, 43 App. 504. The question what is new matter, in such a sense as to require that it should be traversed by the reply, will be treated in the chapter on The Reply (ch. XXVIII).

The mode of pleading new matter is further considered in §§ 697, 698, *post.*

[2] Wheeler & Wilson M. Co. v. Tinsley, 75 Mo. 458. See also § 600, *ante.*

[3] Luther v. Brown, 66 App. 227.

[4] School District v. Sheidley, 138 Mo. 672. This question is fully discussed in §§ 577–582, where the cases are collated. Consult, also, §§ 151–160, and § 333, *ante.*

[5] Bauer v. Wagner, 39 Mo. 385; Northrup v. Miss. Valley Ins. Co., 47 Mo. 435; State to use v. Williams, 48 Mo. 210.

[6] Coble v. McDaniel, 33 Mo. 363; Adams v. Trigg, 37 Mo. 141; Darrett v. Donnelly, 38 Mo. 492.

When the new matter set up in the answer amounts to a complete defense to the suit, it is not necessary to traverse any of the allegations of the petition.[1] Thus, where in a suit on an attachment bond the petition alleged as a breach of the bond that defendant had failed to prosecute the attachment suit without delay and with effect, an answer admitting the abatement of the attachment suit as alleged in the petition, but alleging that such judgment was not a final one, because motions in arrest of judgment and for a new trial were still pending and undetermined in the court in which the judgment was rendered, is not a confession and avoidance, but in effect an allegation that no cause of action has accrued on the bond.[2] So also is a plea that the cause is still pending in an appellate court.[3]

**§ 627. Facts occurring after the institution of the suit.**— As a general rule the rights of the parties to an action must be considered as fixed by the state of facts existing at the time when the action is brought. But this rule is not universal. For instance, if an action is brought for the recovery of money, any payment or part payment which may have been made subsequently to the commencement of the action may be pleaded in the answer, or even by an amendment to the answer in the nature of a plea *puis darrein continuance.* And such a plea, if proved, will have the effect of reducing the damages, or even of preventing a recovery, except, of course, as to the costs which had accrued prior to the filing of the plea.[4] Trover is another instance where the exception may apply. If the owner regains his property, his damage is what he has lost by the temporary conversion, and no more; and defendant may, under certain circumstances, surrender to the plaintiff the possession of the goods, even after the action brought, and plead such fact in his answer.[4] And on the same principle a receipt may be given in evidence, though it is dated and was given after the commencement of the action, if it tends to prove that the subject-matter of the action has been satisfied in whole or in part.[5] But such facts cannot be shown under a general denial.[6]

[1] Kortzendorfer v. St. Louis, 52 Mo. 204.

[2] State to use v. Williams, 48 Mo. 210. The averments might have been proved under a general denial.

[3] Cohn v. Lehman, 93 Mo. 574.

[4] Ward v. Moffett, 38 App. 395.

[5] Wade v. Emerson, 17 Mo. 267.

[6] Cato v. Hutson, 7 Mo. 142.

In the chapter on The Reply (ch. XXVIII) the question whether matters occurring since the institution of the suit can be set up in the reply will be considered.

**§ 628. Cross-bill.**— A cross-bill must be within the scope of the original bill, and germane to its subject-matter.[1] If the answer does not seek affirmative relief against the plaintiff, it cannot be treated as a cross-bill.[2] Where the new matter in the answer is in the nature of a cross-bill or cross-action, and concludes with a prayer for relief, the rules governing the granting of relief to the defendant are the same as those governing the relief asked for in a petition; and if the prayer is for general relief, any relief appropriate to the facts alleged and proved may be granted.[3]

**§ 629. Cross-bill between defendants.**— This subject has been so fully considered in chapter II[4] that it is unnecessary to add anything here, and the reader is referred to that chapter.

[1] Boland v. Ross, 120 Mo. 208.

[2] Baer v. Pfaff, 44 App. 35. See also Jones v. Moore, 42 Mo. 413.

[3] Snider v. Colman, 72 Mo. 568; Bevin v. Powell, 83 Mo. 365; Conrad v. Howard, 89 Mo. 217.

One of the most frequent forms in which new matter appears in an answer is where defendant sets up a counter-claim or set-off, and these also partake of the nature of a cross-bill. These subjects will be treated in the next chapter.

[4] See §§ 30–33.

## CHAPTER XXIV.

### COUNTER-CLAIM AND SET-OFF.


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680. Same — In proceedings against stockholders.
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**§ 630. Their origin and nature.**— The answer may contain, besides the denial and the statement of new matter constituting

a defense, a statement of any new matter constituting a counter claim.[1] The right of set-off did not exist at common law, and is purely of statutory origin.[2] If the right does not exist under the statute it does not exist at all.[3] And it is unnecessary to state that this is equally true of the right of counter-claim. Mutual debts could not at common law be applied in satisfaction of each other unless there was an express agreement between the parties to that effect.[4]

**§ 631. What is included in these terms.**— Under the statutory term "counter-claim" is included what was before known as matter of set-off and as matter of recoupment.[5] Nothing can be pleaded as a statutory counter-claim which does not constitute a demand against the plaintiff.[6] A defendant pleading a set-off occupies substantially the position of a plaintiff, and must have a subsisting demand which would afford the subject-matter for a cause of action.[7] And nothing can be set up as a counter-claim which is not a cause of action and which does not contain the substance necessary to sustain an action by defendant against the plaintiff, if the plaintiff had not sued the defendant.[8] Thus a set-off is an independent claim which defendant may bring in to extinguish in whole or in part the claim upon which he is sued, or he may sue upon it independently.[9] If he pleads it as a set-off, he in effect brings an action for the amount of such set-off.[10] It is an underlying principle of the doctrine of set-off and counter-claim that, whenever entire justice can be done both parties by an adjustment of their mutual demands, without violating any of the settled rules of law, it ought to be done.[11]

**§ 632. How they operate.**— Mutual demands do not offset and adjust themselves by their own vigor or by operation of law, without any accounting or settlement between the parties.[12] Neither by a bill in equity, nor by an action at law, can a debtor compel his creditor to allow a set-off against a debt which plaintiff admits to be due the creditor; he must wait until his creditor

[1] Rev. Stat. 1899, § 604.

[2] Fink v. Bruihl, 47 Mo. 173; State ex rel. v. Eldridge, 65 Mo. 584; Kortjohn v. Continental Nat. Bank, 63 App. 166; Haseltine v. Thrasher, 65 App. 334.

[3] Frowein v. Calvird, 75 App. 567.

[4] Kortjohn v. Continental Nat. Bank, 63 App. 166.

[5] Gordon v. Bruner, 49 Mo. 570.

[6] Barnes v. McMullins, 78 Mo. 260.

[7] Barber v. Baker, 70 App. 680.

[8] McPherson v. Meek, 30 Mo. 345.

[9] Wright v. Salisbury, 46 Mo. 26.

[10] Russell v. Owen, 61 Mo. 185.

[11] Green v. Conrad, 114 Mo. 651.

[12] Merchants' Ins. Co. v. Hill, 12 App. 148.

sues upon the debt, and then plead the set-off or counter-claim by way of defense.[1]

§ 633. **The statutory provisions.**— A counter-claim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and must arise out of one of the following causes of action: *first*, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; *second*, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. Defendant may set forth as many counter-claims as he has, whether legal or equitable or both, but they must each be separately stated so as to be intelligibly distinguished.[2] The matter constituting the counter-claim must, like the cause of action stated in the petition, be set forth in ordinary and concise language, without unnecessary repetition.[3] If any two or more persons are mutually indebted in any manner whatsoever, and one of them commences an action against the other, one debt may be set off against the other, although such debts are of a different nature.[4]

§ 634. **Construction of the statute.**[5]— Our courts were inclined at first to put a narrow construction on the provisions of section 605, *supra*.[6] In *Jones v. Moore*,[7] Judge Holmes, speaking for the court, says: "A counter-claim must be of the nature of an action at law. Different defenses or counter-claims may be separately stated in the same answer; but equitable matter, that is an equity for relief, can constitute a defense only, and not properly a counter-claim. Equity may afford relief in some cases by decreeing the payment of money or a compensation by way of damages, and in some very special cases may, perhaps, direct an assessment of damages, but the jurisdiction must be founded upon some equity. That equity may be a defense to the cause of action at law, or it may not. If it be not a defense, it cannot be joined in the same suit. A cause of action which wholly defeats the demand of the plaintiff cannot be a counter-claim." (p. 419.) The above case was an action upon promissory notes. The an-

[1] Abshire v. Board of Education, 18 App. 573.

[2] Rev. Stat. 1899, sec. 605.

[3] Rev. Stat. 1899, sec. 604.

[4] Rev. Stat. 1899, sec. 4487.

[5] That this statute must be considered with reference to the statute governing a debtor's exemptions, see § 641, *post*, notes 5–7, p. 335.

[6] See § 633, *ante*.

[7] 42 Mo. 413.

swer admitted the execution of the notes, and set up the following equitable defense: That the notes were secured by a deed of trust under which the trustee sold the land conveyed thereby; that in making the sale the trustee did not follow the terms of the deed of trust, and that the sale was collusive and unfair; that by reason of these facts the land was bought in by the plaintiff at a totally inadequate price; and the answer prayed for equitable relief, and also for a recoupment of damages. The supreme court justified its decision by holding that the effect of the judgment in the court below was to adjudge against the defendant the equities raised in the answer, and that a prayer for recoupment of damages does not constitute a counter-claim. The language of the learned judge is: "This answer contained an equitable defense, but not a counter-claim. A recoupment or set-off is not of the nature of a defense or plea in bar, but admits the cause of action and claims an allowance in diminution of the plaintiff's demand; and it is not a counter-claim."[1]

§ 635. It is not altogether clear just how far the court intended to go in the foregoing case. But if it was intended to decide that an equitable counter-claim could not be set up to an action at law, it has long since been overruled, and the right to plead such a counter-claim is now fully recognized by our courts. In a comparatively recent case,[2] the supreme court, speaking through Brace, J., says: "The defense may be either legal or equitable, and the counter-claim may be either legal or equitable, if in favor of the defendant and against the plaintiff, arising out of the transaction set forth in the petition or connected with the subject of the action, upon which counter-claim defendant may have judgment. It is settled law in this state that under the Code in actions of ejectment the defendant may by answer interpose an equitable defense, and have his equities tried and determined in that action, without having to resort to an independent suit in equity. Such being the case, then, according to the plain reading of the Code, affirmative relief may certainly be given to the defendant upon his answer in all cases where, from the nature of the subject-matter and the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity jurisprudence." (p. 564.) And the decision of the court in *Primm v. Raboteau*,[3] that in an action of ejectment defendant might obtain equitable relief in the nature of a bill of peace re-

[1] 42 Mo., p. 419. [2] Swope v. Weller, 119 Mo. 556. [3] 56 Mo. 407.

straining the plaintiff from further vexing and harassing defendant with repeated ejectment suits, is fully approved and followed.

§ 636. In *Tarwater v. Hannibal & St. J. R. Co.*,[1] which was an action for injury to stock, the answer contained an allegation that plaintiff carelessly and negligently turned the animal out upon the uninclosed lands adjoining the railroad, and that by means of that act of gross negligence on the part of plaintiff the animal got upon the track and was run over, whereby defendant's cars were thrown off the track and injured to the amount of $5,000, and that the injury done to said stock was the same injury mentioned in the plaintiff's petition; this being followed by a prayer for judgment against the plaintiff for $5,000 damages. It was held that this answer neither contained any special defense to the plaintiff's cause of action, nor was it a counter-claim. But the court held further that, if a counter-claim, it was in the nature of a cross-action, and that the trial court committed no error in striking it out, since, as an independent cause of action arising out of the same transaction, it stated no additional facts which, if true, and notwithstanding that the facts stated in the petition stood confessed as true also, would entitle the defendant to a judgment against the plaintiff. Whether this decision would now be recognized as correct for the reasons given may be doubted. But it is plain that the facts constituting the counter-claim were so mingled with the facts constituting the defense that the court might properly have disregarded it for that reason alone.[2]

§ 637. **Counter-claim defined.**—I find in *Holzbauer v. Heine*[3] so clear a definition of the term "counter-claim," as used in the codes, that I insert here a somewhat extended extract from the opinion. "The term 'counter-claim' is new to the law, and not to be found in the dictionaries, and some of the New York judges have animadverted with great severity on the framers of the Code for using a term not only new, but which had no definitely established legal meaning. But surely the term is sufficiently plain and simple. Where the defendant has against the plaintiff a cause of action upon which he might have maintained a suit, such cause of action is a counter-claim. The parties, then, have cross-demands, and, in effect, there are two causes of action before the court for trial in the same suit. Both parties are to a certain extent plaintiffs and both defendants. The answer then

[1] 42 Mo. 193. [2] See § 673, *post*. [3] 37 Mo. 443.

does not substantially differ from a petition, and the reply to the answer performs substantially the same office as the answer to the petition. Each party claims affirmative relief from the other. If both parties establish their claims, the judgment is rendered for the one or the other, according as his demand may be found to be in excess." (p. 444.) Notwithstanding this logical definition of the term, the learned judge goes on to state that "where the defendant sets up a counter-claim, the presumption is that the plaintiff has a good cause of action against him, and he proposes to meet it by establishing another cause of action against the plaintiff." If it is intended to say that such is the legal presumption, it may be conceded to be true in the case of a set-off. But the purpose of the Code in providing a counter-claim in addition to a set-off is manifestly to avoid this result, and to enable a defendant at the same time to deny that plaintiff has any cause of action against him, and yet in the same proceeding to bring an action against the plaintiff. Such a distinction is, I think, recognized in *McAdow v. Ross*,[1] where the opinion, containing a suggestion that the respondent in the case seemed to make no distinction between a counter-claim and a set-off, proceeds as follows: "It is not required that a counter-claim should be a liquidated demand, nor is it required that there should be any *mutual indebtedness* existing between the parties. The law authorizing one debt to be *set off* against another requires the debts so set off to be mutual debts existing between the parties, which excludes the idea of unliquidated damages, *and is altogether different from a counter-claim*, each defense being governed by the particular statute relating thereto." (pp. 204, 207.)[2]

§ 638. Under the first subdivision of section 605 a counter-claim may be interposed in the same form, whether plaintiff's action be *ex delicto* or *ex contractu;* for the facts being precisely the same in both phases of the action, the counter-claim arises upon the express terms of the statute, and is equally available.[3]

**§ 639. Decisions as to what is a counter-claim.**— A plea of a partial failure of consideration is not a counter-claim.[4] And the same is true of equitable matter constituting simply a de-

[1] 53 Mo. 199.

[2] That from the pleading of a counter-claim there does not arise any legal presumption of the justice of the plaintiff's demand is also recognized in Jones v. Moore, 42 Mo. 413, and in Hay v. Short, 49 Mo. 139.

[3] Heman v. McNamara, 77 App. 1. This point is fully discussed in § 660, *post.*

[4] Carpenter v. Myers, 32 Mo. 213.

fense to the legal causes of action, even though there is a prayer for a recoupment of damages.[1] A plea of payment, even though the answer sets up an account showing the payments, is not a counter-claim, but merely a plea in bar.[2] Where A. brings an action against B. on the individual liability of defendant, unsettled partnership accounts between the parties cannot be set up by way of counter-claim.[3] Under the last section of the statute which is set out in section 633, *ante*,[4] it is not necessary that the cross-demands should grow out of the contract or cause of action upon which plaintiff sues; they may be of a different nature. The only requirement of the statute is that the debts must be such as to entitle plaintiff to an action against defendant, and defendant to an action against plaintiff. This was the rule at common law,[5] and is likewise the rule under the Code.[6] This is one of the differences between the statutory counter-claim and set-off which will be more fully referred to hereafter.[7] A set-off may be pleaded whenever the plaintiff is individually liable for the debt pleaded as a set-off, and the claims are such as may be the subject of set-off.[8]

§ **640. Must be pleaded.**— A set-off must be pleaded; it cannot be proved under a plea of payment.[9]

§ **641. Right of set-off in equity.**— The jurisdiction of equity to afford relief where defendant has a cross-demand is of ancient origin and existed prior to any statute of set-off, and still exists independent of any statute. But courts of equity are often enabled under the statute, on the well known principle of following the law, to afford more efficient relief, and in a greater variety of cases, than could have been done before the statute was adopted.[10] One of the recognized grounds upon which equity interposes its relief in favor of a cross-demand is the inability of defendant to avail himself of a legal offset.[11] The mere existence of cross-demands will not be sufficient to justify a set-off in equity against a nominal owner or assignee without value; there must be some fact disclosing imminent danger of loss, such as insolv-

[1] Jones v. Moore, 42 Mo. 413. See also in this connection Glover v. Henderson, 120 Mo. 367.

[2] Holzbauer v. Heine, 37 Mo. 443.

[3] Berthold v. O'Hara, 121 Mo. 88.

[4] Rev. Stat. 1899, sec. 4487.

[5] Whaley v. Cape, 4 Mo. 233, and Austin v. Feland, 8 Mo. 309.

[6] McCuin v. Frazier, 38 App. 63.

[7] See § 643, *post*.

[8] Weiss v. Wahl, 5 App. 408.

[9] Oldham v. Henderson, 4 Mo. 295; Holzbauer v. Heine, 37 Mo. 443. See §§ 673-677, *post*.

[10] Barnes v. McMullins, 78 Mo. 260.

[11] Washington Sav. Bank v. Butchers' & Drovers' Bank, 130 Mo. 155, 164.

ency or non-residence.[1] Insolvency or non-residence often furnishes a ground upon which a court of equity will declare an offset where it would not be allowed at law.[2] If the demand which is sought to be set off is definite and certain, and the insolvency of the adverse party is admitted, equity may give full and final redress by decreeing a set-off or any other relief consistent and proper in the case.[3] A demand cannot, in equity any more than at law, be set off because of the insolvency of the plaintiff, unless it existed against the plaintiff and in favor of the defendant, at the time of the commencement of the suit, and had then become due.[4] The equitable rule that the insolvency of a party against whom the set-off is evoked will not prevent the allowance of the set-off has no application where the statutory exemptions are claimed, and will be nullified by such allowance;[5] for the statute providing for set-off must always be construed with reference to the exemption statute.[6] In no case will the equitable jurisdiction be exercised in favor of an unliquidated cross-demand which is *ex delicto* in its nature.[7]

§ **642. Subject-matter of a pending action.**— If while an action is pending the plaintiff therein is sued by the defendant, the plaintiff in the first action may in the second action set off the subject-matter of the original action; and that, too, though it may have been reduced to a judgment.[8] Where a bank sues its cashier on his bond for wrongfully permitting an overdraft, it may nevertheless set up such overdraft as a counter-claim in an action brought against it to recover the amount of the cashier's deposit in the bank, though such deposit had been assigned by the cashier to the plaintiff.[9] Where there is an attachment for rent, defendant cannot set up as a counter-claim damages caused by the levying of such attachment.[10]

§ **643. Distinction between counter-claim and set-off.**—There is an essential distinction between a set-off and a counter-claim; a set-off is not co-extensive with a counter-claim, but lacks many of its essential features.[11] In fact, the old doctrine of set-off has little analogy to the counter-claim under our statute.[12] A set-off

[1] Gemmell v. Hueben, 71 App. 291.
[2] Foote v. Clark, 102 Mo. 394.
[3] Field v. Oliver, 43 Mo. 200.
[4] Storts v. George, 150 Mo. 1.
[5] Lewis v. Gill, 76 App. 504.
[6] Wagner v. North Furn. & Carp. Co., 63 App. 206; Lewis v. Gill, 76 App. 504.
[7] Barnes v. McMullins, 78 Mo. 260.
[8] Gunn v. Todd, 21 Mo. 303.
[9] St. Louis Pub. Schools v. Broadway Sav. Bank, 12 App. 104, 84 Mo. 56.
[10] Hembrock v. Stark, 53 Mo. 588.
[11] Heman v. McNamara, 77 App. 1.
[12] Empire Transp. Co. v. Boggiano, 52 Mo. 294.

is a cross-debt; it is a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, and on the other sets up a demand of his own to counterbalance it either in whole or in part.[1] And the statute which authorizes one debt to be set off against another[2] requires the debts so set off to be mutual debts existing between the parties, which excludes the idea of unliquidated damages, and thus differs from a counter-claim. For it is not required that a counter-claim should be a liquidated demand, nor that there should be a mutual indebtedness existing between the parties. If the cause of action arises out of the contract or transaction set forth in the petition, or is connected with the subject of that action, it may be pleaded as a counter-claim, whether the damages claimed by defendant are liquidated or not.[3] It is not only immaterial in such a case whether the counter-claim sets up a liquidated or unliquidated demand, but it is also immaterial whether it presents a legal or equitable cross-suit; but as a set-off can be pleaded only where there is a mutual indebtedness, it can never be based upon an unliquidated demand.[4]

§ 644. **And between them and recoupment.**— The distinction between a set-off and recoupment is now important only from the fact that the former must arise from contract, and can only be used in an action founded upon contract; while the latter may spring from a wrong, provided it arose out of the transaction set forth in the petition, or was connected with the subject of the action. In other words, the term "recoupment" is now embraced in the term "counter-claim."[5] The original theory of a recoupment was that defendant admitted the plaintiff's right of action, but alleged that plaintiff had also committed breaches of the same contract to defendant's injury, and that defendant's damages should be considered in reduction of the amount of plaintiff's recovery.[6] But the sphere of recoupment is now much enlarged; and defendant may recover a balance found to be due him as well by recoupment as by counter-claim.[7] The defendant may recoup damages, even though he could not have maintained an action against the plaintiff to recover for the injury out of which the right of recoupment grows. Thus if an administrator

[1] Zerbe v. Missouri, K. & T. R. Co., 80 App. 414.

[2] Rev. Stat. 1899, sec. 4487.

[3] McAdow v. Ross, 53 Mo. 199.

[4] Heman v. McNamara, 77 App. 1.

[5] Hay v. Short, 49 Mo. 139; Gordon v. Bruner, 49 Mo. 570.

[6] Wagner v. Dette, 2 App. 254.

[7] Gordon v. Bruner, 49 Mo. 570; Wagner v. Dette, 2 App. 254.

sues for rent due under a lease from his intestate, defendant may recoup the damages arising from a breach of the covenant to repair which was contained in the lease.[1] In an action for work done by plaintiff under a contract, defendant may waive his right to refuse all payment, and may recoup from plaintiff the reasonable value of whatever was necessary to complete the work according to the contract; but defendant could not plead as a set-off what it actually cost him to have the work completed in a proper manner.[2]

**§ 645. Cases in which recoupment is not allowed.**— In an action by a servant for wages, defendant cannot recoup damages for a tort committed by the plaintiff, consisting of an abuse of his position and privileges as defendant's servant.[3] In an action of forcible entry and detainer, defendant cannot set up damages to himself growing out of the contract.[4] Plaintiff built a boat hull for defendant, which he delivered two months after the time agreed upon, but it was accepted by defendant without objection. In an action by plaintiff for the price of the boat defendant could not recoup speculative damages, which he claimed to have suffered in the loss of profits on account of being deprived of the boat during the two months.[5]

**§ 646. Where the damages are unliquidated.**— It has already been shown[6] that one of the distinctions between a set-off and a counter-claim is that in the former case unliquidated damages cannot be pleaded, while in case of a counter-claim it is immaterial that the damages are not liquidated. There are a few decisions on this point which are worthy of note in this connection. Where defendant took out a policy of insurance with plaintiff, and gave his notes for the premiums on the express condition that plaintiff would make to defendant a loan of money to a certain amount, but plaintiff failed to make the loan, defendant may, when an action is brought on the premium notes, set up by way of counter-claim the damages suffered by him in consequence of plaintiff's refusal to make the loan.[7] The owner of a cargo which has been lost or damaged by negligent navigation on the

[1] Green v. Bell, 3 App. 291.

[2] Fletcher v. Milburn Mfg. Co., 35 App. 321.

[3] Walker v. Lewandovska, 15 App. 581.

[4] Johnson v. Hoffman, 53 Mo. 504.

[5] Taylor v. Maguire, 12 Mo. 313, 13 Mo. 517. For a further instance of recoupment, see Madison v. Danville Mining Co., 65 App. 564.

[6] § 643, *ante*.

[7] Life Ass'n v. Cravens, 60 Mo. 388.

part of the carrier may recover damages therefor as a counter-claim in an action for the freight, notwithstanding the damages are unliquidated.[1] It is true it has been held by the court of appeals and by the supreme court that where an action is brought upon an appeal bond, or upon an attachment bond, a set-off is not allowable, since a cause of action on such bonds is for unliquidated damages.[2] This ruling cannot be questioned if it is limited to a construction of section 4487,[3] which relates to set-off, since that section refers exclusively to debts, and expressly provides that the party must be "mutually indebted." In fact this point was expressly so ruled in *State ex rel. v. Modrell*,[4] which was an action upon an executor's bond. But in none of these cases was the decision intended to apply to what is now section 605.[5] For an action on an appeal bond is an action on a contract. So is an action on an attachment bond. The judgment pleaded as a set-off in the case decided by the court of appeals was also a contract.[6] And in the supreme court case the breach of the covenants of a lease was a breach of contract. It is not probable, therefore, that either of these courts intended to hold that the judgment in the one case, and the breach of the covenants in the other, could not be pleaded as a counter-claim; for such holding would be practically repugnant to the second subdivision of section 605.[7] In fact, the supreme court has recently expressly held that in an action on an appeal bond a counter-claim may be pleaded, whether the damages to be recovered by plaintiff are considered as damages which are liquidated or unliquidated.[8]

§ 647. **There must be mutuality.**— As defendant, when pleading a counter-claim or set-off, occupies the position of a plaintiff, and the plaintiff then occupies the position of a defendant, a demand can never be pleaded as a counter-claim or set-off unless it is such as would entitle the defendant to maintain an independent action on it against the plaintiff. Therefore there must be mutuality. So far as section 4487[9] is concerned, which relates solely to set-offs, and in which the underlying principle

[1] Conrad v. De Montcourt, 138 Mo. 311.

[2] May v. Kellar, 1 App. 381; State ex rel. v. Eldridge, 65 Mo. 584.

[3] Rev. Stat. 1899.

[4] 15 Mo. 421.

[5] Rev. Stat. 1899.

[6] See Smith v. Moore, 53 App. 525, 531.

[7] Rev. Stat. 1899.

[8] Green v. Conrad, 114 Mo. 651.

[9] Rev. Stat. 1899.

is that only mutual debts may be set off,[1] when the statute speaks of mutuality of demands, it means that the indebtedness must be such as to entitle plaintiff to an action against defendant and defendant to an action against plaintiff.[2] Agreements to allow individual debts to be set off against a joint claim can only be made effectual by the concurrence of all of the joint creditors.[3]

**§ 648. Cases illustrating the rule as to mutuality.**— A judgment against the payee of a promissory note cannot at law be set off against the indorsee of such payee, although the note was transferred after its maturity.[4] A claim by plaintiff against a railroad company for damages on account of the destruction of his barn by fire cannot be reduced by the amount of money plaintiff has received from an insurance company as an indemnity for the loss of the same barn, since the railroad company is not a party to the insurance contract, and has no interest in it.[5] Damages done to A by the tortious act of B cannot be set off against damages done to A by the separate tortious act of C.[6] Where the demand sued on by plaintiff has come into his hands by assignment through several intermediate assignees, defendant cannot set off a demand in his favor against one of the intermediate assignees who held the claim before it was due.[7]

**§ 649. Mutuality — Representative or guardian.**— Section 4489[8] provides that, in suits brought by administrators and executors, debts existing against the deceased and belonging to the defendant at the time of the death, may be set off by the defendant in the same manner as if suit had been brought by the deceased; but it further provides that no demand against an executor or administrator in his individual capacity shall be allowed as a set-off in any action brought by the executor or administrator upon a contract made by him in his representative capacity, whether the contract shows on its face or not the representative capacity in which he contracted. Where one was sued by an administrator for money claimed by the administrator to have been received by the defendant, but which equitably belonged to the intestate, defendant pleaded as a counter-claim that he was a surety for the intestate, on certain notes which had been

[1] Haseltine v. Thrasher, 65 App. 334; Gemmell v. Hueben, 71 App. 291; Frowein v. Calvird, 75 App. 567.
[2] Weiss v. Wahl, 5 App. 408.
[3] Higgins v. Cartwright, 25 App. 609.
[4] Gemmell v. Hueben, 71 App. 291.
[5] Matthews v. Mo. Pac. R. Co., 142 Mo. 645.
[6] Arnold v. Sayings Co., 76 App. 159.
[7] Frowein v. Calvird, 75 App. 567.
[8] Rev. Stat. 1899.

proved against the estate, and which he had paid after they were so proved. It was held that, as the notes were not paid by defendant as surety until after they had been allowed against the estate of the principal, they did not belong to the defendant at the time of the intestate's decease, and therefore did not come within the statute.[1] If the administrator sues on a demand accruing after the death of the intestate, defendant cannot set off a claim against deceased which accrued in his life-time.[2] And this rule applies to an action by an administrator for the conversion of property owned by her as such.[3] The indebtedness of a legatee or distributee to the estate constitutes assets which it is the duty of the executor to collect, and such indebtedness may be deducted from any legacy or distributive share of the debtor.[4] In the case cited it is further decided that the right of set-off exists, not only where the legatee or distributee was indebted to the deceased before the latter's death, but also where, after the death, he has contracted a liability to the estate or to the administrator; and a judgment creditor cannot, by asserting a judgment lien, deprive the administrator of this equitable right of set-off.[4]

**§ 650. Decisions illustrating the rule as to representatives and guardians.**— While the rule is, where one brings an action in a representative capacity as an administrator of a decedent or as a trustee, that defendant cannot plead by way of counterclaim a debt due defendant from plaintiff individually, yet where the action is by an administrator against several defendants, the latter may set off amounts which plaintiff, as administrator, has been ordered to pay to defendants as distributees; and it is immaterial that the set-off pleaded by the defendants is made up of the amounts due each separately under the order of distribution.[5] If an action is brought on the bond of an executor against him and his sureties, the indebtedness of plaintiff to the testator in his life-time is not a subject of set-off.[6] An administrator cannot before final settlement set off against a note due by him personally an amount due by plaintiff to him as administrator.[7] If a payment has been made by a defendant in his capacity as executor, he cannot set up such payment to defeat a claim brought by plaintiff against him as an individual.[8] A debt due to a defendant as guardian cannot be set off against a demand due by

[1] White v. Henley, 54 Mo. 592.
[2] Woodward v. McGaugh, 8 Mo. 161.
[3] Lee v. Lee, 21 Mo. 531.
[4] Hopkins v. Thompson, 73 App. 401.
[5] Whaley v. Cape, 4 Mo. 233.
[6] State to use v. Modrell, 15 Mo. 421.
[7] Sanford v. Foss, 58 App. 474.
[8] Devore v. Devore, 138 Mo. 181.

him individually.[1] But if the guardian of an insane person brings an action on a note payable to him as guardian, a defendant may set off a debt to him from the ward.[2]

**§ 651. An exception to the rule.**— While an administrator cannot, to the detriment of the creditors of the estate or its distributees or legatees, discharge a debt due the estate by a cancellation of his individual liability to the debtor of the estate, such debtor is nevertheless entitled to a credit by way of equitable set-off, where by its allowance justice will be done as between him and the administrator, without affecting the rights of any one except those of the administrator as such, and as heir or devisee.[3]

**§ 652. The rule in case of trustees.**— A chose in action which is assignable cannot be set off by one to whom it is transferred, if he holds it only as trustee.[4] A demand due a county for money borrowed of the county school fund may be set off against a demand due by the county for services rendered in behalf of the same fund, and which by contract are to be paid out of it, since the county stands in the position of trustee in respect to both demands.[5]

**§ 653. Mutuality—Joint against individual demand.**—Where the action is against several defendants on a joint demand in favor of plaintiff and against them all, one of the defendants may set up as a counter-claim a several demand existing in his favor against the plaintiff.[6] Where a set-off is thus pleaded by one of the defendants, the plaintiff may in his reply set up a claim by himself against the defendant so pleading.[7]

**§ 654. Partnership and individual debts.**— The question of set-off where individual and partnership debts are involved is discussed in *Weiss v. Wahl*,[8] where it is said to be well settled that, in an action against a member of a firm for his individual debt, he cannot set off a demand due the firm; the obvious reason of this rule being that, were it otherwise, a firm might be made to

[1] Gansner v. Franks, 75 Mo. 64.

[2] Nickerson v. Gilliam, 29 Mo. 456.

[3] State ex rel. v. Donegan, 94 Mo. 66.

[4] McDonald v. Harrison, 12 Mo. 447.

[5] Smallwood v. Lafayette County, 75 Mo. 450.

[6] Austin v. Feland, 8 Mo. 309; Kent v. Rogers, 24 Mo. 306; Mortland v. Holton, 44 Mo. 58; Stephens v. Schuchmann, 32 App. 333; Skinker v. Smith, 48 App. 91. It is also said by the court of appeals in Higgins v. Cartwright, 25 App. 609, that agreements to allow individual debts to be set off against a joint claim are effectual only when made by each of the joint creditors.

[7] Mortland v. Holton, 44 Mo. 58. See also a case under § 650, n. 5, p. 340.

[8] 5 App. 408. See also Ruddle v. Horine, 34 App. 616; Lamb v. Brolaski, 38 Mo. 51; Weil v. Jones, 70 Mo. 560.

pay all the private debts of one partner to the injury of the other partners and of the partnership creditors. But there is no reason why, if the firm of which plaintiff is a member is indebted to the defendant, the latter should not be allowed to set off such debt of the firm to him. Each member of the firm being individually liable for all its debts, such partnership debt is a debt of the plaintiff to the defendant. He owes the whole of it, and may be sued separately and be made to pay the whole of it. And it is immaterial though the other partners are liable with him for the same debt. In the case of two plaintiffs, one of whom is liable for the set-off and the other not, a different case is presented and the rule does not apply. So one who is sued for a debt due a firm cannot set off a debt due him by one of the partners.[1] The rule that where one member of a firm is sued for an individual debt, he cannot set off a debt due to his firm, does not apply if the goods furnished by the firm, and for which the firm debt accrued, were charged to the individual partner and not to plaintiff;[2] and defendant may show that at the time of the creation of the individual debt it was agreed by all the partners that it should be paid by applying the amount on de fendant's debt to the plaintiff firm.[3] Where the plaintiff in an action upon a promissory note agreed to give to a firm, of which the defendant was a member, commissions for the sale of cattle, and those commissions were assigned to defendant by his firm before plaintiff commenced his action on the note, then such commissions were, for the purpose of a set-off, due defendant at the date of the institution of the suit; and if defendant's copartners allowed him the commissions individually, and it was understood by all parties that the sale was made by the defendant individually on his own account, although in the name of the firm, this was in effect an assignment to defendant with notice to plaintiff.[4] If an individual defendant in his answer pleads a set-off, and plaintiff denies the set-off in the replication, plaintiff may show that the dealings out of which defendant's claim of set-off arose were with a partnership of which defendant was a member, and not with defendant individually.[5]

§ 655. **Same — In case of a surviving partner.** — A debt due a sole surviving partner may be set off against a debt due from

[1] Payne v. O'Shea, 84 Mo. 129; Nipper v. Jones, 27 App. 538; Wolff v. Matthews, 39 App. 376.

[2] Lamb v. Brolaski, 38 Mo. 51.

[3] Nipper v. Jones, 27 App. 538.

[4] Hall v. Allen, 80 Mo. 286.

[5] Sedgwick v. Evans, 25 App. 388. See also Mortland v. Holton, 44 Mo. 58, where the principle is applied.

him individually, and *vice versa*.[1] The reason of this is clear. For by the death of the other partner, the debt became a sole and separate demand belonging to, or owing by, the survivor.

§ 656. **As between partners.**— Where plaintiff and defendant have been or are partners, but the subject-matter of plaintiff's cause of action is independent of the partnership, defendant cannot set up an indebtedness of plaintiff to him growing out of the partnership, until after there has been a settlement of the partnership affairs.[2] Moreover, if there is no connection between the debt sued on and the partnership transactions, and there is no allegation of any fact calling for the interposition of a court of equity, the court will not decree a dissolution of the partnership and a settlement of the partnership accounts, in order to allow an amount due the defendant to be set off against plaintiff's demand.[3]

§ 657. **Mutuality — Surety or guarantor.**— As a surety is entitled to take advantage of all the defenses and all the securities of which his principal might avail himself, he may apply a demand in favor of the principal alone in satisfaction of one against the principal and surety.[4] And the right to offset one judgment with another in such cases exists at common law independent of the statute.[5] If a principal and a surety are both sued on a bond, they may both plead as a counter-claim a judgment obtained by the principal against the obligee on debts existing at the time the bond was executed.[6] But if a set-off is pleaded by the principal, the plaintiff may in reply set off a debt due him from the principal additional to the joint debt sued on, and such pleading does not constitute a departure.[7] If one of two sureties has paid the debt of the principal and is afterwards sued by a co-surety on an ordinary debt, he may plead as a counter-claim the liability of the plaintiff as co-surety to contribute towards the payment of the principal's debt.[8] Where a principal had a fund set apart for payment of the debt for which defendant was surety, deposited it in the bank for that purpose, and the bank received it with knowledge of the purpose, but

[1] Cowden v. Elliot, 2 Mo. 60.

[2] Finney v. Turner, 10 Mo. 207; Wright v. Jacobs, 61 Mo. 19; Jones v. Shaw, 67 Mo. 657; Willis v. Barron, 143 Mo. 450.

[3] Leabo v. Renshaw, 61 Mo. 292.

[4] Mortland v. Holton, 44 Mo. 58.

[5] Skinker v. Smith, 48 App. 91.

[6] Green v. Conrad, 114 Mo. 651.

[7] Mortland v. Holton, 44 Mo. 58. See also Sedgwick v. Evans, 25 App. 388, where the principle is applied to a partnership debt.

[8] Moseley v. Fullerton, 59 App. 143.

afterwards made an assignment, and a claim was asserted by the assignee against the surety as the debtor of the bank, the surety may, after paying the debt of the principal, use such deposit as a set-off to the claim of the bank against him.[1]

§ 658. A guarantor of another's contract cannot be subrogated to the rights of such other, by means of a counter-claim to an action brought by the other party to the contract against the guarantor. While the guarantor has the right to avail himself of the defense of fraud practiced upon his principal in obtaining the contract, he cannot, in an action against him by the other party, set up a counter-claim for loss sustained by his principal in trying to perform the contract.[2]

§ 659. **Mutuality in mechanics' lien cases.**—Where a subcontractor brings an action to enforce a mechanic's lien, the question whether he may be met by a counter-claim depends upon which defendant sets up the counter-claim. Such an action is of a two-fold character. It seeks a personal judgment against the contractor, who is personally liable for the debt; and it seeks to charge the land of the property owner with the lien, though he is not personally liable for the debt. There can be no question that if the subcontractor plaintiff is indebted to the principal contractor, one of the defendants, such contractor may set up the indebtedness as a counter-claim or set-off as fully as if the action was solely between himself and the plaintiff. But our courts have taken the position that, as the owner is not sued, strictly speaking, on the contract, and as no personal judgment is sought against him, he cannot plead any counter-claim existing in favor of his co-defendant, the principal contractor, against the plaintiff; and that, therefore, if his co-defendant, the contractor, fails to plead such counter-claim, the owner is powerless to avail himself of it.[3] There can be no question that under a strict technical construction of the rules of pleading the above view may be sustained. But it is plain that such a construction may work great

[1] Rubey v. Watson, 22 App. 428.

[2] Walser v. Wear, 141 Mo. 443. This decision is placed upon the ground that the original contract between the parties was a different and independent contract from that of the guaranty; and while it is admitted that the guarantor has the right to avail himself of all defenses which his principal may have had, he cannot avail himself of a counter-claim which the principal has against the other party to the original contract. The distinction appears to be somewhat technical.

[3] Such is the position taken in the following cases: Wescott v. Bridwell, 40 Mo. 146; Uthoff v. Gerhard, 42 App. 256.

hardship upon the owner, since he may be compelled by a proceeding to enforce a mechanic's lien to pay for his improvements a sum in excess of that agreed upon between himself and the original contractor. I think it may be fairly suggested that, as equity would in such a case relieve the owner from this hardship, and as the Code expressly provides that equitable defenses may be pleaded as well as legal ones, and, furthermore, as one object of the Code is to prevent circuity of action, it would not be unduly stretching the rules of pleading to allow an owner in all such cases to avail himself of every defense which the contractor may have, to at least as great an extent as a surety is allowed to avail himself of the defenses belonging to his principal.[1] I use the term "defense" advisedly; for it is clear that the owner cannot avail himself of the contractor's counter-claim as such. He can in no event recover a balance. He can use it only to reduce, or entirely defeat, the subcontractor's demand. In *McAdow v. Ross*,[2] where a subcontractor brought suit to enforce his lien, the owner set up as a counter-claim that plaintiff had guaranteed that the contractor should build the house in a workmanlike manner and in a certain time, and that he had failed in both respects, and it was held that this counter-claim would lie. The decision, it is true, was based upon the ground that the guaranty in question arose out of the transaction set forth in the petition, or was at all events connected with the subject of the action; but it logically follows from the decision that the point that plaintiff is not seeking a personal judgment against the owner of the property is too technical to find any place under the code practice. For it was as true in the one case as in the other that the subcontractor could have no personal judgment against the owner.[3]

**§ 660. The terms used in section 695.**— Whatever may be the character of the action, the defendant may plead as a counter-claim any cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. And there is one class of cases, those arising on contract, in which he may plead as a coun-

[1] See § 657, *ante*.

[2] 53 Mo. 199. This case contains a very full discussion of the law of counter-claim.

[3] In a very recent case the supreme court decided that, where the original contractor brings a lien suit, the defendant owner may set off the amount of attorney's fees paid by him in defending a suit brought by a subcontractor against the plaintiff as contractor and defendant as owner, the contractor having failed to employ counsel or to make defense in that suit. Dempsey v. Schawacker, 140 Mo. 680.

ter-claim any other cause of action arising also on contract and existing at the commencement of the action.[1] It is important, therefore, to define these terms. What is an action arising on contract? What is a transaction within the purview of the statute? When is a cause of action such that it may be said to be connected with the subject of plaintiff's action? These questions will be considered in their order.[2]

§ **661. What is an action arising on contract.**— In determining what may be considered an action arising on contract, a rather liberal view has been taken by our courts.[3] Thus it has been held that an action on an appeal bond is one arising on contract, though the judgment appealed from was rendered for a tort, since the tort became merged in the judgment.[4] While it is true that, in the absence of an express promise to pay for improvements made by the defendant, the defendant cannot recover for such improvements, yet in case there is an express promise it is the proper subject of counter-claim.[5] Where an action is brought against a bank to collect an amount which its cashier had on deposit with the bank, and which has been assigned to plaintiff, the defendant bank may set up by way of counter-claim a cause of action against the cashier for wrongfully permitting an overdraft. The liability of the cashier to the bank was a breach of duty originating in its contract of employment, the faithful performance of which duty he had assumed by contract.[6]

§ **662. Same— The test.**— The test by which to determine whether a particular demand arises on contract within the meaning of the above section is this: If the demand could have been redressed at common law by any of the forms of action which might be resorted to in order to recover damages for breaches of contract, then it is the proper subject of a counter-claim; otherwise not. If, for instance, defendant could maintain at common law against the plaintiff, on a cause of action set up in the counter-claim, an action of covenant, debt or *assumpsit*, then the cause of action is one growing out of contract within the meaning of the statute.[6] All independent express contracts, whether liqui-

[1] Rev. Stat. 1899, sec. 605.

[2] For an interesting discussion of these questions I refer the reader to the work of Mr. Pomeroy on Remedies and Remedial Rights, sec. 452 *et seq.* and sec. 768 *et seq.*

[3] Barnes v. McMullins, 78 Mo. 260.

[4] Green v. Conrad, 114 Mo. 651.

[5] Wilkerson v. Farnham, 82 Mo. 672.

[6] St. Louis School Board v. Broadway Sav. Bank, 12 App. 104, 84 Mo. 56.

dated or unliquidated, are the subjects of counter-claim under this provision.[1] And it is immaterial whether the counter-claim presents a legal or an equitable cross-suit.[2]

**§ 663. Decisions illustrating the rule as to contracts.**— If the suit is founded upon a cause of action connected in any manner with a contract, a counter-claim arising out of any other contract between the same parties may be set up.[3] It is not necessary in that case that the counter-claim should grow out of the same transaction.[4] If an agent sues his principal for the value of his services, it is competent for the defendant to set off moneys collected for him by the plaintiff while in his employment, and which the plaintiff has not paid over.[5] But a mere obligation to lend money to an insurance company cannot be set off by the company against a debt due the obligor.[6] It has been held that the value of improvements erected by a tenant which he was entitled to remove at the end of his term cannot be set off against an amount due for rent.[7] But this decision was based upon the ground that the right of the tenant to remove his buildings was conditioned upon his having paid all the rents and complied with all the covenants of the lease, and not upon the ground that the counter-claim was not founded upon a contract. An answer which alleges the failure of plaintiff to present to the drawer a draft delivered by defendant to the plaintiff for collection states a cause of action arising on contract.[8]

**§ 664. What is a transaction within the meaning of the statute.**— The term "transaction," as used in the Code, cannot be restricted to the simple statement of the wrong complained of by plaintiff. It includes all the facts and circumstances out of which the injury complained of by plaintiff arose. If these facts and circumstances also furnish to the defendant a ground of complaint or a cause of action against the plaintiff, defendant will be entitled to present such cause of action or ground of complaint as a counter-claim. But he must show by proper aver-

[1] Barnes v. McMullins, 78 Mo. 260; Kamerick v. Castleman, 23 App. 481; Heman v. McNamara, 77 App. 1.

[2] Heman v. McNamara, 77 App. 1.

[3] Empire Transportation Co. v. Boggiano, 52 Mo. 294.

[4] McAdow v. Ross, 53 Mo. 199; Ashby v. Shaw, 82 Mo. 76.

[5] Paul v. Carroll, 12 Mo. 437. This decision might also be made to rest upon the ground that the counter-claim grew out of the transaction on which plaintiff's claim was founded.

[6] Sumrall v. Sun Mut. Ins. Co., 40 Mo. 27. It will be observed that this decision refers only to a set-off.

[7] Clemens v. Murphy, 40 Mo. 121.

[8] Dyas v. Hanson, 14 App. 363.

ments that his claim is a part of the transaction which is the foundation of plaintiff's claim.[1] And it is held in the case cited that if the transaction originated in contract, though the plaintiff's action is in form for a tort, yet defendant may plead a breach of the contract by way of counter-claim.[2] If, in an action to enforce a mechanic's lien, the petition is based upon a *quantum meruit* for labor performed and materials furnished, the defendant owner of the property against which plaintiff seeks to enforce the lien may set off the amount of the attorney's fees paid by him in defending an action brought by a subcontractor against the plaintiff as contractor and against the defendant as owner, the plaintiff having failed to employ counsel or to make any defense to that action.[3] Where the action is upon a written obligation for the payment of money, defendant may plead by way of counter-claim, or to establish a failure of consideration in whole or in part, any matter arising out of the contract or transaction, and which would furnish an independent ground of action *ex delicto* against the plaintiff for damages.[4]

**§ 665. Connected with the subject of the action.**— Where an action is brought by a subcontractor to enforce a mechanic's lien, the owner may set up as a counter-claim that plaintiff had guaranteed that the original contractor should build the house in a workmanlike manner and within a certain time, and that he had failed in both respects, because such a counter-claim is, within the meaning of the first subdivision of section 605,[5] connected with the subject of the action.[6] Where a carrier sues a shipper for the freight due for goods carried, defendant may recover, under a plea of counter-claim, damages arising out of a breach of the contract of carriage.[7] Plaintiff sued for damages arising from the filling up of a ditch, whereby the surface water was dammed up and caused to overflow plaintiff's crops. Defendants set up as a counter-claim the fact that plaintiff had cut openings in another ditch, into which the ditch in question discharged its water, through which openings the water was precipitated on to the land of defendants, injuring the land and the crops. It was held that this counter-claim was properly stricken out as not coming within the above provision of the statute.[8]

[1] Ritchie v. Hayward, 71 Mo. 560.

[2] This is more fully considered in § 667, *post*.

[3] Dempsey v. Schawacker, 140 Mo. 680. See also McAdow v. Ross, 53 Mo. 199.

[4] Brockhaus v. Schilling, 52 App. 73.

[5] Rev. Stat. 1899.

[6] McAdow v. Ross, 53 Mo. 199.

[7] Conrad v. De Montcourt, 138 Mo. 311.

[8] Vaughan v. Rupple, 69 App. 583.

§ 666. **Damages arising from a tort.**— In an action based on contract, defendant cannot plead as a counter-claim damages arising out of a tort,[1] unless the tort grows out of the transaction which is the basis of the action.[2] Thus, where an action was on a promissory note, defendant cannot plead that plaintiff had sold certain corn for him, but that the corn had been sold at less than its market value, and that defendant was entitled to the difference between the price obtained and such market value.[1] So, too, in an action on a promissory note, a cause of action growing out of a tort cannot be set up as a counter-claim.[3] In that case the action was upon a promissory note given for the rental of certain premises. Defendant set up as a counter-claim that he had purchased from plaintiff another piece of ground on which was a stable which passed by the purchase to defendant, and that said stable was carried away and defendant was deprived of it. It was held that this was an action for a tort, that it had nothing to do with the note sued on, and that, therefore, it did not constitute a proper counter-claim in an action on the note, which was given for rental of another piece of property.[4]

§ 667. **Effect of waiving the tort.**— The practice under the common law, which permitted a plaintiff who had been damaged by the wrongful act of another to bring an action in tort, or to waive the tort and sue on an implied promise, prevails under the Code.[5] This rule of practice has an important bearing upon the question of counter-claim. The rule is that in all that class of cases in which a tort has been suffered, and the law permits the sufferer to waive the tort and sue upon an implied contract, if defendant indicates in his plea that he is proceeding on the implied *assumpsit*, his counter-claim will be sustained, under the second subdivision of section 605,[6] as an action arising on contract; and he brings his cross-demand within the meaning and terms of the statute by showing that he has in fact elected to sue in *assumpsit*.[7]

§ 668. **Where plaintiff elects to sue in tort.**—In the above cited case plaintiff's cause of action was founded on contract. A more

[1] Gantt v. Duffy, 71 App. 91.

[2] Conrad v. De Montcourt, 138 Mo. 311.

[3] Wilkerson v. Farnham, 82 Mo. 672.

[4] That, in an action on a promissory note, defendant cannot plead as a set-off damages arising from the fraudulent practices of plaintiff in another and entirely distinct transaction, is held in Pratt v. Menkens, 18 Mo. 158.

[5] See § 265, *ante*.

[6] Rev. Stat. 1899.

[7] Barnes v. McMullins, 78 Mo. 260; Green v. Conrad, 114 Mo. 651, 672.

difficult question arises where the plaintiff elects to sue in tort. The rule undoubtedly is that where the cause of action is founded on a wrong, or, as it is usually expressed, is an action *ex delicto*, defendant will not ordinarily be allowed, under the second subdivision of section 605,[1] to set up a counter-claim predicated on a contract between the parties. But if the tort is so connected with and dependent upon the existence of the contract as to connect the counter-claim with the subject of the action, then it is allowable. If the plaintiff elects to sue *ex delicto*, but the cause of action springs out of a contract which is pleaded as an inducement, defendant may set up a counter-claim growing out of plaintiff's breach of that contract. Thus, in *Ritchie v. Hayward*,[2] plaintiff sued in trover for the conversion of certain sacks. Defendant set up as a counter-claim damages growing out of a breach of contract for the sale of potatoes, which were to be delivered in the sacks, and which were to be of a certain quality, alleging that the sacks of potatoes were delivered, but that they were of an inferior quality, and that these were the sacks alleged by plaintiff to have been converted. The supreme court held that the counter-claim would lie, quoting from Pomeroy on Remedies and Remedial Rights the following as expressing the rule: "Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract the defendant may counter-claim damages for the breach of that contract, the same counter-claim may be interposed when the suit is in form for the tort; the facts being exactly the same in both phases of the action, a counter-claim would clearly arise out of the real transaction which was the foundation of the plaintiff's demand."[3] The rule was applied in *Kamerick v. Castleman*,[4] which was an action for the wrongful entry on plaintiff's land and the appropriation of his crops. The petition alleged that plaintiff rented from defendant certain premises on which he had raised a crop of corn; that a constable had wrongfully and forcibly entered upon the premises and ejected plaintiff therefrom, by reason of which plaintiff lost the crop, and that defendant had incited and instigated the constable to commit the wrong complained of. Defendant set up as a counter-claim damages arising from a breach of the contract of rental set forth in the petition, and it was held that the counter-claim was properly pleaded. The court, speaking through Phillips, P. J., says that

[1] Rev. Stat. 1899. [2] 71 Mo. 560. [3] Id., p. 563. [4] 23 App. 481.

for the wrongful invasion of plaintiff's possession by Castleman, plaintiff had his election to sue on the contract or for the tort. By electing to pursue the latter remedy, he could not cut off the defendant's right to a counter-claim for damages growing out of the breach of the contract of rental.[1]

§ 669. So it may be laid down as a general rule that, whether plaintiff's action is *ex contractu* or *ex delicto*, if the foundation of the action is a contract, defendant may set up as a counter-claim damages arising out of a breach of the contract.[2] In a case where plaintiff sued on an account, defendant set up as a counter-claim a demand for pasturage. It appeared that there was a contract between the parties for pasturage, and that the counter-claim was based on the fact that plaintiff had turned into the pasture a greater number of cattle than he was entitled to graze under the contract. It was held that, while defendant could have recovered in trespass for such excessive pasturage, he had the right to waive the trespass and sue on an implied contract, and therefore the counter-claim was properly based on contract.[3] If a cause of action arises from a breach of trust under such circumstances that the party injured might waive the tort and sue in *assumpsit*, it is a proper subject of counter-claim.[4] Where the assignee of a bankrupt, who is entitled to recover goods which have been delivered in fraud of the act to one of the creditors, brings *assumpsit* against such creditor instead of trover, he thereby affirms the contract, and the creditor may set off his debt.[5]

**§ 670. Action for a penalty.**— In *Woodward v. Conder*,[6] which was a case where plaintiff sued for treble damages under section 4572,[7] for the carrying away of hay grown on plaintiff's premises, defendant pleaded a counter-claim which was of such a nature that it might well be held to have grown out of the transaction set forth as the foundation of plaintiff's claim. But the court of appeals declares that, regardless of the nature of the claim, no counter-claim at all would lie, because an action for a statutory penalty is *quasi*-criminal in its nature, and the statute in regard to counter-claims does not apply.

[1] 23 App., p. 489.
[2] Empire Transportation Co. v. Boggiano, 52 Mo. 294.
[3] McCuin v. Frazier, 38 App. 63.
[4] Banking House v. Harvey, 12 App. 588.
[5] Benoist v. Darby, 12 Mo. 196.
[6] 33 App. 147.
[7] Rev. Stat. 1899.

**§ 671. The debt or demand must be in existence at the commencement of the action.**— Section 605[1] provides that, where a cause of action arising on contract is pleaded as a counter-claim to an action on contract, the cause of action set up in the counter-claim must have existed at the commencement of the action against the defendant. And this is the rule in all cases, whether the counter-claim is an equitable or a legal one.[2] Therefore where the defendant, after the filing of the petition, but before service of the writ upon him, purchased a note of plaintiff for the purpose of using it as an offset, the counter-claim was properly stricken out.[3] And where plaintiff sued by attachment, and defendant pleaded as a counter-claim that plaintiff had the use of certain mules which the sheriff took under the attachment writ and delivered to plaintiff, even if such counter-claim could be held proper under any circumstances, it could not be allowed in that action, since it was not a claim existing at the commencement of the attachment suit.[4]

**§ 672. How the right is affected by an assignment.**— While it does not come strictly within the province of a work on pleading to consider how far the right of set-off or counter-claim can be destroyed or affected by the fact that the claim has been assigned by its original owner, it may be stated in general terms that where a debt or judgment is assigned, as to which a right of set-off had attached at the time of the assignment, the assignee takes it *cum onere*, with the right of set-off still clinging to it.[5] The appointment of a receiver does not affect the rights of the original parties in respect to set-offs or counter-claims existing at the time of the appointment.[6] And the right of a judgment debtor to offset the whole of a judgment obtained by him against the judgment creditor is not affected by an equitable assignment of a part of the latter judgment to a third person.[7] The right of set-off does not include demands subsisting against intermediate assignees, through whose hands the demand may have passed, unless there is an agreement to that effect, supported by a valid consideration.[8] A counter-claim may be set up against

[1] Rev. Stat. 1899.

[2] Reppy v. Reppy, 46 Mo. 571. See also § 681, *post*.

[3] Todd v. Crutzinger, 30 App. 145.

[4] Meincke v. Bracksieck, 14 App. 315. The counter-claim might have been disallowed on broader grounds. See Hembrock v. Stark, 53 Mo. 588.

[5] Skinker v. Smith, 48 App. 91.

[6] Cox v. Volkert, 86 Mo. 505.

[7] Crecelius v. Bierman, 72 App. 355.

[8] Frowein v. Calvird, 75 App. 567.

an assignee for the benefit of creditors in the circuit court after appeal, though it was not set up before the assignee.[1]

**§ 673. Pleading in case of set-off.**— A set-off must be pleaded substantially as though it were a petition in a cross-action.[2] Where a mere set-off is pleaded, there need be no prayer for an affirmative judgment in defendant's favor.[3] As to the set-off, defendant occupies the position of a plaintiff, and the replication of plaintiff is an answer to the defendant's set-off.[4] Where the plea of set-off is accompanied by a deposit in court as a tender of the amount of the difference between plaintiff's demand and the set-off claimed by defendant, this is a conclusive admission of the justice of plaintiff's demand, and will entitle the plaintiff to recover the amount of his demand, less such sum as is found due the defendant on his set-off.[5] A set-off being in the nature of a cross-action, it should be pleaded with all the particularity of a petition, and should contain in substance the same allegations as would be necessary to sustain an original cause of action.[6]

**§ 674. In case of counter-claim.**— A counter-claim must be so pleaded as to show by proper averments that it arises on contract, or that it is a part of the same transaction which is made the foundation of plaintiff's claim.[7] And if the answer does not set out the transactions or contract out of which a certain item of the counter-claim arose, it is not sufficient to warrant the introduction of evidence in its support.[8] The matter constituting the counter-claim should not be blended with the matter intended simply as a defense, but should be separately stated[9] with all the distinctness that would be required if the defendant were suing the plaintiff in an independent proceeding; and the objection that defendant has improperly blended statements touching the defense and those relating to a counter-claim may be raised by motion to strike out.[10]

[1] St. Louis School Board v. Broadway Sav. Bank, 12 App. 104, 84 Mo. 56. There are a number of decisions in this state involving the question of the right of set-off where there has been an assignment for the benefit of creditors; but I do not deem that subject within the legitimate scope of this work.

[2] Brady v. Hill, 1 Mo. 315. See also § 640, *ante*.

[3] Wagner v. Dette, 2 App. 254.

[4] Winton State Bank v. Harris, 54 App. 156.

[5] Williamson v. Baley, 78 Mo. 636.

[6] Brady v. Hill, 1 Mo. 315.

[7] Ritchie v. Hayward, 71 Mo. 560.

[8] Fallon v. Stahl, 17 App. 475.

[9] Rev. Stat. 1899, sec. 605.

[10] Kinney v. Miller, 25 Mo. 576. It seems also that this objection may be raised by demurrer.

§ 675. The same rules in regard to pleading a proviso or exception, as to negativing affirmative matter, and as to anticipating defenses, apply to a counter-claim which have heretofore been laid down as applicable to petitions.[1] In an action to recover on a *quantum meruit* the reasonable price for constructing a building, defendant set up a special contract between him and plaintiff whereby the latter was, in case of delay in completing the building, to forfeit a certain sum daily. It appearing that this agreement of plaintiff was coupled with certain conditions, it was held that it devolved on the defendant to note those conditions in his answer, and to aver and prove facts consistent therewith which would tend to show plaintiff's liability; and if he failed to do so, he was not entitled to recover even nominal damages.[2]

§ 676. **Pleading set-off in reply.**— Where one of several defendants pleads as a set-off a debt due from the plaintiff to him individually, plaintiff may in his reply set up a debt additional to the one sued on by him, which is due from the individual defendant to himself.[3] But where there is a single defendant, and he interposes a set-off to plaintiff's demand, the plaintiff cannot set up in reply another demand distinct from that upon which his action is based, and which he might have included in his petition.[4] In no case can plaintiff recover a judgment on the set-off pleaded in his reply; he can use it only to reduce the amount of the defendant's set-off.[5]

§ 677. **Effect of pleading a set-off or counter-claim.**— The effect of pleading a set-off is to admit the justice of plaintiff's demand; but such admission is not a consequence of pleading a counter-claim.[5]

§ 678. **Defeating a set-off which has once accrued.**—An assignment of a non-negotiable note cannot be canceled so as to defeat set-offs which the maker has against the assignee.[6] And the right of a judgment debtor to set off a judgment obtained by him against the judgment creditor is not affected by an equitable assignment of a part of the latter judgment to a third person.[7]

§ 679. **The rules relating to set-off and counter-claim applied in specific cases.**— Where defendant was induced by fraud-

[1] See ch. XIII.
[2] Connelly v. Priest, 72 App. 673.
[3] Mortland v. Holton, 44 Mo. 58.
[4] Dawson v. Dillon, 26 Mo. 395.
[5] Jones v. Moore, 42 Mo. 413; Zerbe v. M., K. & T. R. Co., 80 App. 414. See also Hay v. Short, 49 Mo. 139.
[6] Billings v. Atchison, 15 Mo. 68.
[7] Crecelius v. Bierman, 72 App. 355.

ulent misrepresentations of the plaintiff to purchase the article for the price of which the action was brought, he may set up by way of counter-claim any damage he has suffered by reason of the misrepresentations, since a defendant may show by way of counter-claim or recoupment, or to establish a failure of consideration in whole or in part, any matter arising out of the contract or transaction which would furnish an independent ground of action *ex delicto* against the plaintiff for damages. And defendant will be entitled to recoup by way of counter-claim the difference between the value of the property if the representations of plaintiff had been true, and its value as it actually turned out to be.[1] Of course, the vendee might bring a separate action for the deceit.[2] So, too, defendant may show by way of counter-claim damages sustained by him by reason of a breach of warranty in the sale.[3] And ordinarily where a breach of warranty is shown, the cross-claims arising out of the transaction compensate one another, and the plaintiff is entitled to recover only the balance;[3] a rule which applies equally to actions for the purchase price of land.[4] Where the action is brought upon a bond given for the purchase-money of land, defendant may set up as a counter-claim and recoup the value of fixtures removed by the vendor without defendant's knowledge or consent after the contract of sale and before the formal transfer of the land.[5] So, too, in an action on a note given for the purchase-money of land, defendant may recoup the value of a crop taken from the land by the vendor after the sale.[6] But defendant cannot set up as a counter-claim the fact that the sheriff took personal property from his possession and delivered it into the possession of plaintiff, and that plaintiff has had the use and enjoyment of it, since, while the property was in the possession of the sheriff, defendant having no right of user of it could claim nothing for its use by another.[7]

**§ 680. Same — In proceedings against stockholders.**— Section 985[8] provides that, where an execution against a corporation has been returned *nulla bona*, the execution creditor may

[1] Nelson v. Johnson, 25 Mo. 430; Brockhaus v. Schilling, 52 App. 73; Owens v. Rector, 44 Mo. 389.

[2] Hall v. Clark, 21 Mo. 415.

[3] Brown v. Weldon, 27 App. 251, 99 Mo. 64.

[4] Hall v. Clark, 21 Mo. 415; House v. Marshall, 18 Mo. 368.

[5] Grand Lodge v. Knox, 20 Mo. 433. This case contains a review of the authorities on the subject of recoupment.

[6] Gordon v. Bruner, 49 Mo. 570.

[7] Meincke v. Bracksieck, 14 App. 315. See also § 658, *ante*.

[8] Rev. Stat. 1899.

proceed by a motion against any stockholder of the corporation, whose shares have not been fully paid, for an execution against such stockholder to the extent of the balance remaining unpaid on his stock. It is the well settled law of this state, that, when such a proceeding is commenced against a stockholder, he may set off any matured indebtedness of the corporation to him, whether or not he formally pleads such set-off or counter-claim.[1] But he cannot set off a claim against the corporation which was acquired by him after the execution against the corporation had been returned *nulla bona*.[2]

§ 681. **Same — In garnishment cases.**— The question frequently arises in cases of garnishment how far the garnishee may avail himself of an indebtedness to himself by the execution defendant. The general rule is that the garnishee can set off only such claims as he had against the original defendant at the date of the garnishment, and as were then due.[3] If a bank is garnished in an attachment suit against one of its depositors, it cannot set up, either as a defense or a counter-claim, that it holds a note against such depositor for a greater sum than the amount of its deposit, if such note is not due at the date of the garnishment, even though the depositor was insolvent at the time.[4]

[1] Webber v. Leighton, 8 App. 502; Merchants' Ins. Co. v. Hill, 12 App. 148, 86 Mo. 466; Jerman v. Benton, 79 Mo. 143.

[2] Coquard v. Prendergast, 35 App. 237.

[3] Clark v. Kinealy, 13 App. 104.

[4] Iler v. Midland Nat. Bank, 69 App. 64, in which case the earlier decisions are cited. See also § 671, *ante*.

## CHAPTER XXV.

### THE ANSWER — DENIAL UNDER OATH.


§ 682. The statute.
683. To what cases the statute applies.
684. What constitutes a denial of execution.
685. Exceptions to the rule.
686. Scope of the words "corporate authorities."
687. Effect of omitting the affidavit.
689. Cases illustrating the rule as to denying under oath.
690. Instrument executed by agent.
691. Does not preclude other defenses.
692. Verification may be supplied.
693. Denying incorporation.
694. Denying partnership.


§ 682. **The statute.**— When any petition or other pleading is founded upon an instrument in writing charged to have been executed by the other party, and which has not been lost or destroyed, the execution of the instrument is adjudged confessed unless the party charged to have executed it denies the execution thereof by answer or replication verified by affidavit.[1] In an action before a justice of the peace on a note, the affidavit stated that defendant did not sign the note sued upon, and it was held that this was sufficient to put in issue the execution of the note, though the statute uses the word "execution" and not "signing."[2] Doubtless the same rule would be held to apply to pleadings in a court of record.

§ 683. **To what cases the statute applies.**— It is not necessary that the denial of the execution should be verified by affidavit if the instrument is executed by both parties.[3] If a deed is void *ab initio*, and not merely voidable, and there is a plea of *non est factum* verified by affidavit, any facts may be given in evidence which tend to show that the conveyance is void.[4] Plaintiff, in order to recover, must introduce the instrument and must offer evidence tending to prove the signature of the defendant to it,[5] and defendant on his part may show that his name was procured on the note by fraudulent practices and without

[1] Rev. Stat. 1899, sec. 746.
[2] Edmonston v. Henry, 45 App. 346.
[3] Kelly v. Thuey, 143 Mo. 422.
[4] Corby v. Weddle, 57 Mo. 452. See § 590, *ante*.
[5] Cox v. Bishop, 55 App. 135; Smith v. Roach, 59 App. 115.

his consent.[1] The fact that a bond was executed in the name of a firm by one of its members without authority from his copartners cannot be shown unless the plea of *non est factum* is verified.[2] And if a firm sues on a note made to them, a plea which simply puts in issue the title of plaintiffs to the note sued on admits the partnership of the plaintiffs as alleged in the petition.[3] In an action on a bond the objection that it was not properly executed because it was not sealed must be raised by denial of its execution under oath.[4] The above section 746 applies to a contract of insurance and to a certificate issued by a benefit society; and plaintiff is not required to offer the certificate in evidence nor the application for membership, even though such application is made a part of the contract.[5]

§ 684. **What constitutes a denial of execution.**— Where defendant pleads that the legal effect of the instrument sued on is different from that alleged by the plaintiff, this does not constitute a denial of its execution.[6]

§ 685. **Exceptions to the rule.**— The section requiring the verification of a denial that the instrument pleaded was executed by the party charged therewith does not extend so far as to permit an instrument to be received in evidence without proof of its execution if the action is against an executor or administrator, or any other person representing the person charged to have executed the instrument, nor against any county, city or town which is sued upon an instrument alleged to have been executed by such county, city or town, or any corporate authorities.[7] The statute has no reference to bonds or notes issued by an agent, and the defendant may in such case show the agent's want of authority, though he fails to deny the execution under oath.[8] Section 746[9] has no application to an action against a guardian of a person of unsound mind, when the latter is charged to have executed the note sued on; and the execution of such note must be proved before it can be introduced in evidence.[10]

[1] Corby v. Weddle, 57 Mo. 452.

[2] Green County v. Wilhite, 29 App. 459.

[3] Arthur v. Pendleton, 7 Mo. 519.

[4] State to use v. Chamberlin, 54 Mo. 338.

[5] Thomas v. Guaranty Fund Life Ass'n, 73 App. 371.

[6] Cox v. Volkert, 86 Mo. 505.

[7] Rev. Stat. 1899, sec. 747; Julian v. Rogers, 87 Mo. 229.

[8] Wahrendorff v. Whitaker, 1 Mo. 205; Pope v. Risley, 23 Mo. 185; Carpenter v. Lathrop, 51 Mo. 483; McQuade v. St. Louis, 9 App. 580. See also § 690, *post*.

[9] Rev. Stat. 1899.

[10] Wisdom v. Shanklin, 74 App. 428. Consult also § 683, *ante*.

**§ 686. Scope of the words "corporate authorities."** — The words "corporate authorities," contained in section 747,[1] are not to be so construed as to make that section apply to a business corporation.[2]

**§ 687. Effect of omitting the affidavit.**— The decisions of this state as to the effect of denying without oath the execution of an instrument are not altogether harmonious. This is due in part to the different wording of the statute at different periods. Thus, prior to 1868 the statute provided that if the execution were not denied under oath the instrument should be "received in evidence;" and it was held that the effect of that statute was simply to change the rule of evidence, and to make the instrument admissible without proving its execution. But under that statute it was necessary to produce the instrument at the trial.[3] The amendment of 1868[4] so changed the law that the effect of the failure to verify the answer is not merely to permit the introduction of the instrument without proof of its execution. The statute says that "the execution of the instrument shall be adjudged confessed," if not denied under oath. And such is the present reading of the statute.[5] At first this amendment was very narrowly construed. In *Hammerslough v. Cheatham*[6] the answer averred that the deed of trust which was the basis of the suit "was not executed or delivered" by the assumed grantor therein, but the answer was not verified. Evidence was admitted to show that, while the instrument was signed by the grantor, it was never delivered by her. And the supreme court held that this ruling was correct, saying that the section in question "applies only to the manual signing of the instrument, and not to the act of delivery." (p. 22.) I think, however, that this decision stands alone, and is opposed to the entire current of the Missouri decisions as to what constitutes the execution of an instrument. In 1860 the supreme court said that the delivery of a note is necessary to its complete execution and is essential to its validity.[7] And again in 1862 the same court says that an allegation that defendant executed his note is a sufficient averment of delivery.[8] In 1873 that court decided that sealing and deliv-

[1] See preceding section.

[2] Parsons v. Egyptian Levee Co., 73 App. 458.

[3] Carroll v. Corn, 1 Mo. 161; Hanly v. Reed, 1 Mo. 487; Foster v. Nowlin, 4 Mo. 18; Payne v. Snell, 4 Mo. 238; Dempsey v. Harrison, 4 Mo. 267.

[4] Laws 1868, p. 86.

[5] Rev. Stat. 1899, sec. 746.

[6] 84 Mo. 13.

[7] Carter v. McClintock, 29 Mo. 464.

[8] Meyer v. Fette, 31 Mo. 423.

ery are included in the term "execution of a deed;"[1] and in 1886 that the signing and delivery are included in the execution of a note.[2] As late as 1898 it reiterates its position on this point, saying that a deed is not executed until delivered.[3]

§ 688. Such, too, has been the holding of the court of appeals. In *Bates v. Scheik*[4] it is said that where defendant is charged with executing a contract it is not necessary to aver a delivery of it. In fact, even if there were no other decisions contrary to that of *Hammerslough v. Cheatham*,[5] that case must be considered as having been practically overruled by *Hart v. Harrison Wire Co.*,[6] where the court uses this language: "By failing to deny the execution by answer verified by affidavit, the party admits the genuineness of the signatures and also delivery of the instrument, the signing and delivery being included in the execution."[7]

**§ 689. Cases illustrating the rule as to denying under oath.** By a failure to verify the pleading, a party attacking the instrument will be precluded from introducing any proof tending to impeach the execution of the instrument.[8] And evidence to show that the signature to the contract was procured by fraud is evidence tending to impeach the execution of the instrument.[9] But it seems that a fraudulent alteration of the instrument may be shown though there is no affidavit.[10] Though a bond is signed in the firm name, and no authority is shown from the firm for executing it, yet the effect of a failure to deny its execution under oath is that the execution stands confessed.[11] So, too, where the answer of one defendant contained an allegation that one of his copartners had, in signing the contract sued on, acted outside of the scope of the partnership, and that therefore the defendant so answering was not bound, but the answer was not verified, the execution of the contract was confessed.[12] If the allegation of the petition is that a promissory note was executed by a busi-

[1] State to use v. Chamberlin, 54 Mo. 338.

[2] Hart v. Harrison Wire Co., 91 Mo. 414.

[3] Hall v. Farmers' Bank, 145 Mo. 418.

[4] 47 App. 642.

[5] 84 Mo. 13.

[6] 91 Mo. 414.

[7] 91 Mo., p. 422.

[8] Beck Lith. Co. v. Obert, 54 App. 240.

[9] Beck Lith. Co. v. Obert, 54 App. 240; Corby v. Weddle, 57 Mo. 452.

[10] Law v. Crawford, 67 App. 150. Substantially the same rule is laid down by the supreme court in a quite early case. Whitmer v. Frye, 10 Mo. 348.

[11] McGill v. Wallace, 22 App. 675.

[12] Bates v. Scheik, 47 App. 642.

ness corporation, an unverified answer admits the execution.[1] So far has this rule been carried that it has been held that plaintiff is under no obligation to prove the execution of the instrument if not denied by a verified pleading, though the petition alleges that defendant signed the note under a name not his own.[2]

**§ 690. Instrument executed by agent.**— If the note sued on is executed by an agent, and the execution is denied by an unverified answer, the authority of the agent must nevertheless be proved.[3]

**§ 691. Does not preclude other defenses.**— The adjudication by confession to which the plaintiff is entitled under section 746[4] is limited to the execution of the instrument. If his petition fails to state facts sufficient to constitute a cause of action, he will not be entitled to judgment.[5] And while, by failing to deny under oath, the execution of the contract stands admitted, yet defendant may set up in his answer a new or modified contract subsequently entered into between the parties.[6] The fact that plaintiff is the owner of the instrument may be put in issue without a verification.[7] If defendant contends that the legal effect of the instrument sued on is different from that alleged by plaintiff, this is not such a denial of its execution as requires that the answer shall be verified.[8] Where the action is on a written contract, and the answer contains, first, a duly verified denial of the execution of the writing, and, secondly, alleges that the contract was not performed in accordance with its terms, the answer taken as a whole does not constitute an admission of the execution of the instrument.[9]

**§ 692. Verification may be supplied.**— Where the fact is that defendant was not a party to the instrument sued on and so stated in his answer, but through inadvertence he failed to verify his answer, he should be permitted on suitable terms to supply the affidavit.[10]

**§ 693. Denying incorporation.**— Where plaintiff or defendant sues or is sued as a corporation, it is not necessary to prove

[1] Patrick v. Boonville Gas Co., 17 App. 462; Smith v. Rembaugh, 21 App. 390.

[2] Zervis v. Unnerstall, 29 App. 474. And Saville v. Huffstetter, 63 App. 273, recognizes the rule.

[3] Swearingen v. Knox, 10 Mo. 31. See also § 685, *ante*.

[4] Rev. Stat. 1899.

[5] Hart v. Harrison Wire Co., 91 Mo. 414.

[6] Merrill v. Central Trust Co., 46 App. 236.

[7] Saville v. Huffstetter, 63 App. 273.

[8] Cox v. Volkert, 86 Mo. 505.

[9] Cox v. Bishop, 55 App. 135.

[10] Anderson v. Hance, 49 Mo. 159.

the incorporation, unless the fact is put in issue by an affidavit filed with the pleadings.[1] The denial of the incorporation must be by an affidavit filed with the pleading; it is not sufficient to deny it in the pleading itself, though the latter is verified.[2] The section applies to municipal corporations as well as to private corporations, and the corporate existence of a defendant sued as a municipal corporation is admitted unless denied in an affidavit filed with the answer.[3] If in an action by a school district the allegations of the petition that it was duly organized as a village school district, and was duly incorporated as such, are put in issue by the answer, and plaintiff's corporate existence is denied in an affidavit by defendant, the burden is thereby cast on the plaintiff to prove its corporate existence.[4]

§ 694. **Denying partnership.**— Where plaintiffs or defendants sue or are sued as a partnership, and the names of the several partners are set forth in the petition or answer, it is not necessary to prove the fact of the partnership, unless such fact is put in issue by an affidavit filed with the pleading.[5] This section not only relieves the party alleging a partnership from the necessity of proving the fact, unless the opposite party puts it in issue, but it prescribes the only manner of tendering such issue, and that is by affidavit filed with the pleading.[6] The section applies only to actions by or against partners; if the suit is for an accounting between partners, the allegation of partnership is not admitted by a failure to deny it by affidavit.[7] The objection that a bond was executed in the name of a firm by one of its members without authority from his copartners must be verified by affidavit.[8] If a firm sues on a note made to them, and the answer simply puts in issue the title of the plaintiffs to the note, it admits the plaintiffs' partnership.[9]

[1] Rev. Stat. 1899, sec. 746.

[2] Meyer v. Insurance Co., 73 App. 166.

[3] Pierce v. Lutesville, 25 App. 317; Walker v. Point Pleasant, 49 App. 244. This is undoubtedly the meaning to be placed upon these decisions, though they apparently speak of a verified answer.

[4] School District v. Wallace, 75 App. 317.

[5] Rev. Stat. 1899, sec. 746.

[6] Haysler v. Dawson, 28 App. 531. The same rule applies in case of a corporation. Meyer v. Insurance Co., 73 App. 166.

[7] Short v. Taylor, 137 Mo. 517.

[8] Greene County v. Wilhite, 29 App. 459.

[9] Arthur v. Pendleton, 7 Mo. 519.

## CHAPTER XXVI.

### THE FOREGOING RULES GOVERNING ANSWERS APPLIED TO VARIOUS ISSUES AND PROCEEDINGS.


§ 695. Pleading accord.
696. Pleading appeal.
697. Defenses under the bankruptcy law.
698. Pleading duress.
699. Pleading a former recovery.
700. The defense of fraud.
701. The defense of illegality.
702. The defense of innocent purchaser for value.
703. Pleading want of jurisdiction.
704. Pleading the statute of limitations.
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**§ 695. Pleading accord.**— A plea of accord and satisfaction which fails to state that the matter relied upon as an accord was accepted as a satisfaction by the creditor will be held bad if demurred to,[1] but is good after verdict.[2] Thus a plea alleging that defendant executed to plaintiff a deed which was to be absolute in case the note in suit was not paid, without alleging an acceptance of the deed in satisfaction, is bad.[3] A plea of accord and satisfaction is new matter which requires a reply.[4]

[1] Oil Well Supply Co. v. Wolfe, 127 Mo. 616.

[2] Wilkerson v. Bruce, 37 App. 156.

[3] Shaw v. Burton, 5 Mo. 478.

[4] Robinson v. Suter, 15 App. 399.

§ 696. **Pleading appeal.**— An allegation in an answer that an appeal has been taken is insufficient; the answer should further allege that the appeal is pending and undetermined.[1]

§ 697. **Defenses under the bankruptcy law.**— A bankrupt who is sued for a debt which was contracted before his bankruptcy must set up his discharge in bar of the action.[2] Where a bankrupt pleads his discharge, and the plea is met by an averment that the discharge was invalid by reason of a fraudulent transfer of property by the bankrupt, it is not necessary to set out the property so fraudulently transferred, nor the names of the nominal parties to the conveyance; it is sufficient to set out the names of those beneficially interested in the transfer.[3]

§ 698. **Pleading duress.**— In pleading duress *per minas*, an allegation of "threats, intimidation and overbearing persistency" of the party is insufficient. The nature of the threats and defendant's fear of their execution must be alleged.[4]

§ 699. **Pleading a former recovery.**—The defense of a former adjudication must be specially pleaded, since it cannot be proved under a general denial.[5] It is a defense which must be made by answer, and cannot ordinarily be raised by demurrer.[6] If, however, the petition shows upon its face that every material issue of fact alleged therein has been adjudged in a former case, a demurrer will lie, and it is in such a case not necessary to file an answer in order to raise the defense.[7] A plea of *res judicata* is not sufficient if it fails to state that the court in which the judgment was rendered had jurisdiction of the parties and of the subject-matter, or at least that it was a court of general jurisdiction.[8] In an action for rent accruing on a lease, the answer averred that plaintiff had already maintained one action against defendant on the lease in question, and had in that action recovered a judgment for rent which embraced a part of the time for which recovery was sought in the suit in question, and this was held to constitute a good defense, at least *pro tanto*, and therefore a general demurrer to the petition was properly overruled.[9]

§ 700. **The defense of fraud.**— It was the rule at common law that a general allegation of fraud was sufficient in an answer,[10] which ruling was followed in the first case involving this ques-

[1] Poteet v. Boyd, 10 Mo. 160.
[2] Bank v. Franciscus, 15 Mo. 303.
[3] Shelton v. Pease, 10 Mo. 473.
[4] Murdock v. Lewis, 26 App. 234.
[5] State ex rel. v. Henning, 55 App. 579.
[6] Kelly v. Hurt, 61 Mo. 463.
[7] Givens v. Thompson, 110 Mo. 432.
[8] State to use v. Brooke, 29 App. 286.
[9] Kerr v. Simmons, 82 Mo. 269.
[10] Montgomery v. Tipton, 1 Mo. 446; Pemberton v. Staples, 6 Mo. 59.

tion which was decided after the change in the system.[1] In that case the court says: "Under the former system it was sufficient to state this matter in this general form. Fraud usually consisting of a great multiplicity of facts and circumstances, it was found by experience highly inconvenient, if not quite impracticable, to set them forth with particularity, and hence this general mode of stating such matter of defense forced itself into use, and was approved of by the courts. And we see no reason for holding otherwise under the new code."[2] The doctrine announced in *Edgell v. Sigerson*[3] was adhered to as late as the year 1870 in *Fox v. Webster;*[4] but the case of *Clough v. Holden*,[5] while it does not overrule the above cases, certainly weakens their authority, the doctrine announced in them being so limited as to permit a general charge of fraud in an answer only when the fraud charged in the answer refers to matter stated in the petition. Otherwise a bare allegation of fraud is no more sufficient in an answer than in a petition. This distinction is not entirely clear. However, if the action is one to collect a note given in settlement, and defendant desires to attack the settlement for fraud, or because of errors or mistakes, the answer must specifically set forth the fraud, errors or mistakes complained of.[6] And a like rule applies where the action is on an account stated.[7] In *Nichols v. Stevens*[8] the case of *Edgell v. Sigerson*[9] is expressly overruled;

[1] Edgell v. Sigerson, 20 Mo. 494.

[2] 20 Mo., p. 496. It must be admitted that this reasoning is not without force. Courts have always studiously refrained from defining fraud for the reason that it presents itself in so many and various phases, and because to do so would have a tendency to limit the powers of the court in affording a remedy for fraudulent practices. It certainly strikes one that this reason applies with almost equal force to the defining of fraud in a pleading. If the pleader is compelled to state all the facts and circumstances which he relies upon to prove fraud, he will not only be compelled to violate the rule against pleading evidentiary facts, but will be greatly hampered in proving an issue which under the most favorable circumstances it is difficult to prove. It is for this reason probably that while, as I shall show, our courts have somewhat receded from the early position, and now hold that in an answer, as well as in a petition, the facts constituting the fraud must be set forth by the pleader, they have never laid down any definite rule for the guidance of the pleader — they have never delimited the particularity and fullness which it is necessary to employ in pleading these facts and circumstances. See, in this connection, 1 Chitty, Plead. (16th Am. ed.), p. 608.

[3] 20 Mo. 494.

[4] 46 Mo. 181.

[5] 115 Mo. 336.

[6] Kronenberger v. Binz, 56 Mo. 121.

[7] Marmon v. Waller, 23 App. 610.

[8] 123 Mo. 96.

[9] 20 Mo. 494.

and the supreme court declares that in reference to pleading fraud there is no distinction between a petition and an answer, and that an answer must state the constitutive facts of the fraud relied on.

§ 701. **The defense of illegality.**— In setting up the defense that the transaction forming the basis of the suit was a gambling contract, it is enough to aver that the contract actually made by the plaintiff was immoral, illegal and void, in that it was mutually agreed between the parties that there should be no delivery of the article sold, but that the parties thereto should, at the time agreed upon for its delivery, settle the difference in the price agreed to be paid and the market price at that time. Thus, if the answer sets up that plaintiffs, as defendant's brokers, entered into a contract for the purchase of grain, with the understanding that none was to be delivered, but that the difference in price at the time of the contract and at the time of the pretended delivery was to be settled for in money, and that the note sued on was given solely in consideration of the loss so incurred, it sufficiently states the illegality of the contract.[1] Where the defense is that the note was given for a bet on an election, the answer must state that the election was one authorized by law, what particular election it was, between whom pending, and the other necessary facts going to show that it was properly and legally held.[2]

§ 702. **The defense of innocent purchaser for value.**— To entitle a person to invoke the aid of a court of equity on the ground that such person is a *bona fide* purchaser for value and without notice, it must appear that he made his purchase and paid the purchase-money before he had notice of the prior equities; he must therefore show fully and explicitly the time and terms of his purchase, and of the payment of the purchase-money. In a case where the petition contains no allegation as to notice, or where plaintiff does not base his recovery upon the fact that defendant had notice, it would seem on principle, and by analogy with the rule in cases of fraud, that the answer of one who bases his defense upon the claim that he is an innocent purchaser for value must specifically set forth the above facts. But in a case where plaintiff sought to charge land in the hands of defendant with the payment of certain notes, on the ground that plaintiff had an equitable mortgage on the land, and that defendant pur-

[1] Buckingham v. Fitch, 18 App. 91. [2] Sybert v. Jones, 19 Mo. 86.

chased with notice of plaintiff's equitable rights, it was held, apparently with some hesitation, that a simple denial of the allegations of the petition was sufficient to allow proof by defendant of all these facts.[1] However, in *Young v. Schofield*,[2] while the question did not properly arise, because in that case it was the plaintiff who claimed to be an innocent purchaser, yet the court undertakes to lay down the rule governing the answer in such a case. It says: "The claim of innocent purchaser is in an answer an affirmative defense, and in a petition occupies a similar affirmative attitude." (p. 660.) The court adds that, not only must the affirmative claim or affirmative plea contain all the elements necessary to make one an innocent purchaser for value, but those elements must be appropriately amplified. Under the former practice in equity, defendant was required to aver with much explicitness all the facts necessary to constitute him an innocent purchaser for value.[3] And the spirit of the Code, whose object is to require each party to present his side of the case with the utmost fairness, so as to avoid all surprise and undue advantage, should not be held to require less than was required by the courts of chancery in the past. It is certain that the defense cannot be raised under the general denial.[4]

§ **703. Pleading want of jurisdiction.**— In an action upon the judgment of a sister state, a plea to the jurisdiction is insufficient which alleges that defendant was not a resident of the state in which the judgment was rendered; the averment should be that defendant was not in that state.[5] An answer to an action on an Illinois judgment, from which it appears that the law of that state provides for notice by publication, and which alleges that the defendant did not have notice personally or by publication, does not sufficiently allege want of notice by publication.[6]

[1] Wallace v. Wilson, 30 Mo. 335, 340.

[2] 132 Mo. 650.

[3] Wallace v. Wilson, 30 Mo. 335.

[4] Holdsworth v. Shannon, 113 Mo. 508.

[5] Wilson v. Jackson, 10 Mo. 330.

[6] Meyer v. Hartmann, 12 App. 586. This case is not reported in full. But an examination of the opinion on file discloses the fact that the ground of the above decision is that the averment of the answer was only that defendant did not have notice, while it should have been that notice was not in fact given by publication. It appears also from the opinion that the statute of Illinois provides a third method of giving notice in such cases, and the answer failed to negative that method. The case, however, possesses little, if any, authority, since on a rehearing the position was practically abandoned. See Meyer v. Hartmann, 14 App. 130.

A case involving a method of pleading notice will be found in § 734, *post*.

§ 704. **Pleading the statute of limitations.**— Both at common law and under the Code the defense of the statute of limitations must be raised by answer, except in those cases where the statute confers title, in which case it becomes available under the general issue or general denial,[1] as in actions of ejectment.[2] The reason why the rule does not apply to actions of ejectment is that an adverse possession for the period designated in the statute operates not merely as a defense, but is affirmative in its effect, the adverse possession conferring an absolute title upon the adverse possessor. As defendant may show in such an action that defendant has no title, since this tends to disprove his right to possession, he effectually disproves plaintiff's title by showing title in himself by reason of adverse possession. Therefore the operation of the statute may be shown under the general allegation of the petition, or the general denial of the answer.[3]

§ 705. Defendant must set up the defense and make it at the trial; he cannot raise the question for the first time in the supreme court.[4] It cannot ordinarily be taken advantage of by demurrer;[5] though if all the necessary facts appear upon the face of the petition the defense may be made by demurrer,[6] as in cases in which the statute creates a bar without any exception.[7] But the defense can be raised by demurrer only where it clearly appears that plaintiff's case has been fully stated, and that being so stated no recovery can be had.[8] In an action to vacate a judgment on the ground that it was fraudulently obtained, and to divest defendants of their title acquired under the judgment, it appeared upon the face of the petition that more than twenty years had elapsed since the right of action had accrued, and no reason was alleged why the action was not commenced within the twenty years. A demurrer to this petition was sustained.[9]

[1] Benoist v. Darby, 12 Mo. 196; Bell v. Clark, 30 App. 224; Orr v. Rode, 101 Mo. 387; Stoddard County v. Malone, 115 Mo. 508; Maddox v. Duncan, 62 App. 474.

[2] Nelson v. Brodhack, 44 Mo. 596; Fulkerson v. Mitchell, 82 Mo. 13; Holmes v. Kring, 93 Mo. 452; Stocker v. Green, 94 Mo. 280; Fairbanks v. Long, 91 Mo. 628; Campbell v. Laclede Gas Light Co., 84 Mo. 352.

[3] Nelson v. Brodhack, 44 Mo. 596; Fulkerson v. Mitchell, 82 Mo. 13; Holmes v. Kring, 93 Mo. 452; Stocker v. Green, 94 Mo. 280; Fairbanks v. Long, 91 Mo. 628.

[4] Winn v. Cory, 48 Mo. 346.

[5] Smith v. Dean, 19 Mo. 63.

[6] State to use v. Bird, 22 Mo. 470.

[7] State to use v. Bird, 22 Mo. 470; Maddox v. Duncan, 62 App. 474; Henoch v. Chaney, 61 Mo. 129.

[8] McNair v. Lott, 25 Mo. 182; Boyce v. Christy, 47 Mo. 70.

[9] Heffernan v. Howell, 90 Mo. 344.

§ 706. If defendant fails to avail himself of the bar of the statute, either by demurrer or answer, he will be held to have waived it.[1] Even an administrator may waive the defense that a claim presented against the estate is barred by the general statute of limitations, and will be held to have waived it when the record does not show that he interposed it, either by an oral plea or otherwise, it being his duty, even when there are no written pleadings, to distinctly bring the statute to the attention of the trial court if he intends to insist upon it as a bar.[2] The rule that the statute is not available as a defense unless pleaded applies to an action for trespass brought under the statute to recover treble damages.[3] On a motion for judgment against a sheriff for failing to pay over money which he had made on execution, the officer may show that the claim is barred by the statute, though he has not in any way specially pleaded it.[4]

§ 707. **Nature of the defense.**— Section 627[5] provides that when the pleading shall set up the statute of limitations or the statute of frauds, or any other legal bar, the party shall not be deprived of the benefit of such defense by reason of his not denying the facts set forth in the adverse pleading. In *Bauer v. Wagner*[6] there is an intimation that in order to raise this defense the cause of action must be confessed; in other words, that the plea of the statute of limitations is a plea in confession and avoidance. But that case was an action in ejectment, in which it is unnecessary to plead the statute at all, as has been fully shown when we were considering what defenses are raised by a general denial.[7] In a case involving the question of pleading the statute of frauds, it is held that if defendant desires to take advantage of that statute he must either deny the contract or else admit it and plead the statute.[8] I am not aware of any case decided by the courts of Missouri, other than those for the possession of real property, in which the question has been directly passed upon whether a like rule applies to pleading the statute of limitations, and whether, in order to take advantage of the statute, it is necessary to confess the cause of action; although in *Schuchman v.*

[1] Boyce v. Christy, 47 Mo. 70; Stiles v. Smith, 55 Mo. 363.

[2] Carder v. Primm, 47 App. 301.

A case involving the special limitation appliable to mechanics' liens will be found in § 730, *post*.

[3] Stoddard County v. Malone, 115 Mo. 508.

[4] Mitchell v. Fulbright, 52 Mo. 551.

[5] Rev. Stat. 1899.

[6] 39 Mo. 385.

[7] See § 604, *ante*.

[8] Bless v. Jenkins, 129 Mo. 647.

*Heath*[1] the court says that it is perfectly competent for defendant in an action on a promissory note to interpose the statute of limitations and also to deny the execution of the note. But that was a case originating before a justice of the peace, where no written answer is required; and, furthermore, the defendant at the trial withdrew the plea of the statute and elected to rest his defense on other grounds. The case which comes nearest to deciding the direct question is that of *McCormick v. Kaye*,[2] where it is held in the briefest possible language that defendant, by filing an answer in an action of trespass containing a general denial, a justification and the plea of the statute of limitations, does not deprive himself of the right to invoke the statute of limitations as a defense, since the several defenses are not inconsistent. I think that this decision is conclusive, and that it is not necessary, in order that defendant may avail himself of the benefit of the statute of limitations, that he should confess the cause of action. There is, for instance, nothing inconsistent in the two statements that the defendant did not execute a promissory note, and that the promissory note sued on was executed more than ten years prior to the institution of the action. The cases of *Ledbetter v. Ledbetter*[3] and of *Cohn v. Lehman*[4] are in line with the above, in which cases it is expressly ruled that traverses and answers in avoidance may go together when not inconsistent.[5] There is one case in which, a suit being brought to enforce a vendor's lien upon land, the legal title to which the vendor retained in himself, defendant pleaded the statute of limitations and also pleaded that he had made full payment and had demanded a deed, but that the vendor had refused to deliver one, the answer concluding with a prayer for general relief. It was there held that this latter plea and prayer constituted a waiver of the plea of the statute.[6]

**§ 708. Duty of legal representative to plead the statute.**— An administrator is not bound to plead the general statute of limitations, but he is bound to plead the statute especially appli-

[1] 38 App. 280.

[2] 41 App. 263.

[3] 88 Mo. 60.

[4] 93 Mo. 574.

[5] In Massachusetts (which, however, is not a code state) it has been held that if the statute is pleaded as a bar, the burden is on the plaintiff to show both a cause of action and the suing out of process within the period of limitation. Slocum v. Riley, 145 Mass. 370. This is equivalent to holding that the plea of the statute does not confess the cause of action.

[6] Adair v. Adair, 78 Mo. 630.

cable to suits against him in his representative capacity.[1] And if the record does not show that he in some way, by oral plea or otherwise, raised the defense that the claim presented against the estate was barred by the general statute of limitation, he will be held to have waived it.[2] In pleading the special statute he must aver the fact that notice of letters has been given, and of the time when such notice was given.[3] A plea in the following language has been held sufficient: "Defendant denies that plaintiff is entitled to judgment on said note, because more than three years had elapsed since the granting of letters and notice aforesaid when this suit was brought."[4]

**§ 709. Pleading foreign statute of limitations.**— The question as to pleading the statute of limitations of a sister state is discussed in *Williams v. St. Louis & S. F. R. Co.*,[5] and in *Lyman v. Campbell*.[6]

**§ 710. Mode of pleading the statute of limitations.**— The plea should always refer to the commencement of the proceedings supposed to be barred, and not to any subsequent date.[7] A plea alleging that suit was not brought within three years, etc., after, etc., is bad; it should allege that the cause of action had accrued more than three years before suit was brought.[8] In an action against an administrator the answer set up the statute in these words: "Defendant denies that plaintiff is entitled to judgment on said note, because more than three years had elapsed since the granting of letters and notice aforesaid when this suit was brought." This was held a sufficient plea of the statute.[9]

§ 711. A defendant when basing his defense in whole or in part upon the statute of limitations must set out in his answer the particular period of limitation which he chooses to invoke, and he will not be permitted to avail himself of any other.[10] If the answer sets up the bar of five years, it cannot be held to constitute a plea of a bar of ten years.[11]

**§ 712. Pleading contributory negligence.**—Contributory negligence is a matter of defense, and plaintiff need not allege nor

[1] Rev. Stat. 1899, secs. 184, 185 and 189; Stiles v. Smith, 55 Mo. 363.

[2] Carder v. Primm, 47 App. 301.

[3] Wiggins v. Lovering, 9 Mo. 262; Stiles v. Smith, 55 Mo. 363.

[4] Richardson v. Harrison, 36 Mo. 96.

[5] 123 Mo. 573.

[6] 34 App. 213.

These two cases are considered in § 185, *ante*.

[7] Lincoln v. Thompson, 75 Mo. 613.

[8] Finney v. State, 9 Mo. 227.

[9] Richardson v. Harrison, 36 Mo. 96.

[10] Harper v. Eubank, 32 App. 258; Murphy v. De France, 105 Mo. 53.

[11] Hunter v. Hunter, 50 Mo. 445.

prove that he was without fault.[1] It is a defense to be pleaded and proved by the defendant;[2] it is a matter of defense, and does not go in mitigation of damages.[3] If it is not pleaded by the defendant, the question of its existence should not be submitted to the jury as an issue of fact.[4] And the rule is the same even though the petition contains an allegation that plaintiff was injured without any fault on his part and the answer denies the averment.[5]

§ 713. **Extent of the rule.**— An exception to the rule arises where, in an action founded on defendant's negligence, the evidence introduced by the plaintiff shows that his own negligence directly contributed to produce the injury. In such case the plaintiff's evidence disproves his own case and he cannot recover, notwithstanding defendant does not plead his contributory negligence. If, however, the evidence falls short of showing that plaintiff's negligence directly contributed to the injury, and the question of fact is one which might be decided either way, it cannot be availed of as a defense unless it has been pleaded.[6] In other words, the contributory negligence of plaintiff does not, unless set up in defendant's answer, form a separate issue, and it is not to be considered unless an unavoidable inference of contributory negligence arises out of the evidence adduced by the plaintiff, either upon the direct examination of his witnesses or upon their cross-examination.[7] If the inference of contributory negligence does arise from the plaintiff's own testimony, the defendant may take advantage of it regardless of whether such special defense was pleaded by him or not.[8] In an action by an employee for injuries suffered while in the employment of defendant, the conduct of the plaintiff in accepting the service

[1] Petty v. Hann. & St. J. R. Co., 88 Mo. 306; Hudson v. Wabash W. R. Co., 101 Mo. 13; Young v. Shickle Iron Co., 103 Mo. 324.

[2] Thorpe v. Mo. Pac. R. Co., 89 Mo. 650; Mitchell v. Clinton, 99 Mo. 153; Schlereth v. Mo. Pac. R. Co., 96 Mo. 509; Young v. Shickle Iron Co., 103 Mo. 324; Voegeli v. Pickel Marble Co., 49 App. 643; Hughes v. Chicago & Alton R. Co., 127 Mo. 447.

[3] McGowan v. St. Louis Ore & Steel Co., 109 Mo. 518.

[4] Taylor v. Mo. Pac. R. Co., 26 App. 336; Voegeli v. Pickel Marble Co., 49 App. 643.

[5] Hudson v. Wabash W. R. Co., 101 Mo. 13.

[6] Schultze v. Mo. Pac. R. Co., 32 App. 438; Hudson v. Wabash W. R. Co., 101 Mo. 13.

[7] Stone v. Hunt, 94 Mo. 475; Bueshing v. St. Louis Gas Light Co., 73 Mo. 219; Warren v. St. Louis Mer. Exchange, 52 App. 157.

[8] Evans Brick Co. v. St. Louis & S. F. R. Co., 21 App. 648; Warmington v. Atchison, T. & S. F. R. Co., 46 App. 159.

and continuing in it with knowledge of the defects, does not, strictly speaking, present a question of contributory negligence on his part, which, to be available to the defendant, must be pleaded; but the effect of such conduct, without a further showing by plaintiff, is to free the defendant from any negligence of which plaintiff has a right to complain.[1]

§ **714. Manner of pleading contributory negligence.**— It has been seen that in a petition a general charge of negligence is not sufficient, but that the facts which constitute the negligence must be set out with reasonable particularity. The same rule applies to a plea of contributory negligence in the answer. It is not sufficient to aver generally that the damages sustained by plaintiff were the result of his own negligence and want of proper care directly contributing to produce the injury, but the facts constituting the contributory negligence must be set out with reasonable certainty.[2]

§ **715. Pleading notice.**— A case involving the method of pleading notice will be found in section 734, *post.*

§ **716. Pleading payment.**— When payment is pleaded it is not necessary to aver that it was made in lawful money, or to aver what was the medium of the payment.[3] An answer which states that the drawer of a bill of exchange paid the proceeds of a certain consignment to the indorsee, but does not state that the money was received in payment of the bill, nor that the bill was in fact paid, is not a sufficient plea of payment.[4] If the answer states that defendant was summoned as garnishee of the plaintiff in an action before another court, having jurisdiction of the parties and of the subject-matter, and that he was by such court compelled to pay the debt to the plaintiff's creditor and that he did so pay it, this is a sufficient plea of payment.[5] Where the answer states that defendant "paid the plaintiff two sums of money and that the last payment extinguished the note," and gives the dates and amounts of the payments, this is sufficient.[6]

§ **717. Pleading the statute of frauds.**— The statute of frauds is an affirmative defense which must be pleaded; it is not necessary that the petition should contain any allegations of fact showing that the contract is not invalid under the statute.[7] If the

[1] Flynn v. Union Bridge Co., 42 App. 529; Reichla v. Gruensfelder, 52 App. 43.

[2] Harrison v. Mo. Pac. R. Co., 74 Mo. 364.

[3] Ennis v. Hogan, 47 Mo. 513.

[4] German Bank v. Mulhall, 8 App. 558.

[5] Minor v. Rogers Coal Co., 25 App. 78.

[6] Joy v. Cooley, 19 Mo. 645.

[7] Gist v. Eubank, 29 Mo. 248; Van Idour v. Nelson, 60 App. 523; Wild-

petition declares upon a contract, without stating whether it is in writing or not, it will be presumed to be in writing.[1] This is true, at all events, if the contract is one which is required by the statute of frauds to be in writing.[2] In pleading the statute of frauds the facts relied upon to bring the case within the statute must be set out.[3] The answer should expressly aver that the contract was not in writing, and should contain an answer to the other facts alleged.[4]

§ 718. **The answer to an action on an account stated.**— If defendant seeks to challenge the account stated on the ground of fraud or mistake, he must specially set forth the fraud, errors or mistakes complained of.[5]

§ 719. **To actions on bills or notes.**— In an action by the payee against the maker, the answer does not state a legal defense if it avers that there was a written agreement between the parties that if it should not be convenient for the maker to pay the note at maturity the payee would wait his convenience, though the answer also contained an averment that it has not been convenient to pay the note.[6] So in *Bond v. Worley*[7] it was held that an agreement to renew the note could not be set up as a defense.[8] The defendant cannot plead as a defense to an action on a promissory note that he has been injured by the fraudulent practices of plaintiff in another and entirely distinct transaction.[9] Nor can defendant set up the fraudulent acts of the parties to the note and a stranger thereto, done with a view to defeat the rights of the latter's creditors.[10]

bahn v. Robidoux, 11 Mo. 659; Young Men's Christian Ass'n v. Dubach, 82 Mo. 475.

[1] Sharkey v. McDermott, 91 Mo. 647.

[2] Gist v. Eubank, 29 Mo. 248.

[3] Dinkel v. Gundelfinger, 35 Mo. 172.

[4] Bean v. Valle, 2 Mo. 126.

[5] Marmon v. Waller, 53 App. 610.

[6] Atwood v. Lewis, 6 Mo. 392.

[7] 26 Mo. 253.

[8] The ground of these decisions is that, while the respective agreements might furnish the basis for a separate action by the defendant against the plaintiff, they are not pleadable as a defense. But I apprehend that under the liberal provisions of section 605 (Rev. Stat. 1899) the damages arising from the breach of such an agreement may be pleaded as a counterclaim, if not as a defense to the action, and that defendant would not now be required to commence a separate action to enforce the agreement. For it is said in Green v. Conrad, 114 Mo. 651, that it is an underlying principle of the doctrine of set-off and counterclaim that whenever entire justice can be done both parties by an adjustment of their mutual demands, without violating any of the settled rules of law, it ought to be done.

[9] Pratt v. Menkens, 18 Mo. 158.

[10] Moore v. Thompson, 6 Mo. 353.

**§ 720. Decisions as to answers in actions on bills or notes.** An answer which denies any knowledge or information sufficient to form a belief as to whether plaintiffs compose the firm to which the note is made payable raises a triable issue.[1] Where the defense is that the note was given for the purchase of a tract of land, and that the vendor had no title to such land, the answer should show specifically the defect in the title.[2] If the defense interposed is that the note was given for a bet on an election, the answer must state not only that the election was one authorized by the constitution and laws of the state or the United States, but what particular election it was, between whom pending, etc.[3] In an action brought by an indorsee, where the petition alleges that the note was duly executed and was indorsed to plaintiff, it is not a sufficient answer to deny the ownership of the note.[4] But if the answer avers that the notes were assigned to a third person before the commencement of the action, it is sufficient.[5] Where the answer denies the indorsement of the note to plaintiff, alleges that the note was obtained by fraud and that the plaintiff had notice thereof at the time of taking the note, it tenders a material issue; so also does an answer which alleges that the note had been fraudulently altered after its delivery.[6]

**§ 721. Actions on bonds.**— The defense to an action on an administrator's bond that the trust funds had been stolen is an equitable one, but may be pleaded to the action at law.[7] Under the statute defendant may plead in bar payment of the amount due on the bond.[8]

**§ 722. Actions against carriers.**— Where the action against a carrier for damages to goods shipped is based upon the carrier's common-law liability, defendant may set up a special contract limiting the measure of damages.[9] And the mere fact that the plaintiff's action sounds in tort does not prevent the defendant from setting up a special contract.[10]

[1] Wales v. Chamblin, 19 Mo. 500. That such an answer must now be accompanied with an affidavit, see § 694, *ante*.

[2] Copeland v. Loan, 10 Mo. 266.

[3] Sybert v. Jones, 19 Mo. 86.

[4] Bank v. Smith, 33 Mo. 364.

[5] Thomas v. Wash, 1 Mo. 665.

[6] Mechanics' Bank v. Fowler, 36 Mo. 33.

[7] The method of pleading want or failure of consideration is considered in § 723, *post*. The reader should also consult § 734, *post*. As to pleading fraud or illegality as a defense to a note, consult §§ 151–160, 700, 701, *ante*.

[8] State ex rel. v. Meagher, 44 Mo. 356.

[9] Rev. Stat. 1899, secs. 465, 637.

[10] Goodman v. Missouri, K. & T. R. Co., 71 App. 460.

[11] Oxley v. St. Louis, K. C. & N. R. Co., 65 Mo. 629.

§ 723. **Actions on contracts.**— Where in an action upon a note the answer alleges "that the said note was made without any consideration whatever," this sufficiently raises the defense of no consideration.[1] Where, in an action to enforce a mechanic's lien, the petition seeks to recover the reasonable value of the work done and the materials furnished, and plaintiff relies as a defense upon a special written agreement, the answer should set out such agreement together with the breaches of it, so that an intelligible issue may be raised.[2]

§ 724. **On lost instrument.**— A defense as well as an action may be maintained on any instrument of writing notwithstanding it has been lost or destroyed.[3]

§ 725. **Actions of ejectment.**— To an action of ejectment in the usual form, defendant, without interposing either a general or a special denial, set up that plaintiff claimed under a tax sale, and that the proceedings under said tax sale were invalid on grounds set forth in the answer. It was held that the answer was fatally defective in not averring that plaintiff's title was based solely on the tax proceedings.[4]

§ 726. **Equitable defense in ejectment.**— Under the Code the defendant may set up an equitable defense to an action of ejectment, and may set it up either as a simple defense or accompanied with a prayer for affirmative relief. If such defense is set up and there is a trial, the judgment on it is final and conclusive, unless it is reversed on appeal or writ of error, and may be pleaded in bar to a subsequent action between the same parties concerning the same title. To constitute an equitable defense, the answer must state facts which bring the defense under some head of equitable cognizance.[5] It must set forth such a state of facts as would have entitled the defendant to relief under the former equity practice,[6] and it must be set out with the same particularity that would formerly have been necessary in a bill in chancery.[7] Where the action is by heirs, and

[1] Williams v. Mellon, 56 Mo. 262. A case in which the answer signally fails to state a failure of consideration is that of Lyman v. Campbell, 34 App. 213.

[2] Meyer v. Broadwell, 83 Mo. 571.

[3] Rev. Stat. 1899, sec. 642. See § 338, *ante*.

[4] Caines v. Katz, 95 Mo. 333.

[5] Sampson v. Mitchell, 125 Mo. 217.

[6] Maguire v. Vice, 20 Mo. 429.

[7] Carman v. Johnson, 20 Mo. 108. But that it is not necessary to employ the verbosity and fullness of detail which were essential to a good bill in equity under the former practice is apparent, and needs no citation of authorities.

the defense is that the land was sold by an administrator for the payment of the debts of the deceased ancestor of the plaintiffs, which sale was informal and defective, and therefore failed to pass the title, but the answer avers that the purchase-money was used to pay such debts, and that the purchaser has since his purchase paid the taxes and made lasting and valuable improvements, these facts constitute an equity in favor of the defendant, but do not amount to an equitable estoppel which would bar a recovery by the plaintiffs, though they do entitle plaintiffs to an accounting, and to have the sum found to be due defendant declared a lien on the land, so that plaintiffs shall not obtain possession until they have paid the sum so found to be due. But it was at first held that if the answer does not contain a prayer for an accounting, and a demand that the sum found to be due defendant should constitute a lien on the land, it is defective.[1] In the later case of *Sampson v. Mitchell*,[2] the court in division, citing the foregoing case, held that defendant could not obtain the relief because he had not asked for it in his answer. But in the opinion rendered by the court *in banc*, it is intimated that an accounting might be had and the lien declared, though the answer does not contain a prayer therefor. However, in reversing the case, the court *in banc* says that it does so in order that defendant may amend his answer so that it shall contain a prayer for an accounting and a lien.[3]

**§ 727. Actions on insurance policies.**—In an action upon an insurance policy, unless defendant sets up in his answer that the policy would not have been issued if the company had known the real state of the facts, it does not raise any issue as to misrepresentations by the assured.[4] The act of April 1, 1895,[5] requires an insurance company after a loss to furnish to the insured such blank forms of statements and proofs of loss as it desires to be filled out. It is held that the insurance company

[1] Sims v. Gray, 66 Mo. 613.

[2] 125 Mo. 217.

[3] The intimation contained in the case last cited undoubtedly embodies the correct rule, since it is the well-settled practice of our courts to grant any relief which the facts alleged will warrant, whether such relief is or is not specifically prayed. In both the cases just cited the facts pleaded by the defendant were sufficient to warrant an accounting and that the amount found to be due the defendant should be made a charge upon the land which plaintiff was seeking to recover. It would seem, therefore, to be an idle mockery to refuse the relief merely because defendant had omitted in terms to pray for it.

[4] Christian v. Connecticut Mut. Life Ins. Co., 143 Mo. 460.

[5] Rev. Stat. 1899, sec. 7977.

cannot avail itself of the defense that plaintiff did not furnish proofs of loss, unless the answer contains a further allegation that, after the company received notice of the loss, it furnished, or offered to furnish, plaintiff with the necessary blank forms, and that plaintiff refused to receive such blanks, or at least to fill them out and return them.[1] Where in an action on a policy of insurance the petition does not allege that plaintiff had an insurable interest in the property, the fact that the answer does not aver that plaintiff had no insurable interest does not constitute an admission that he had such interest.[2]

§ 728. **Actions on judgments.**— The statute provides that in an action on a judgment, or when a *scire facias* is brought upon a judgment, the defendant may plead in bar a payment of the amount due upon such judgment.[3] In a proceeding by a *scire facias* to revive a judgment, defendant may plead *nul tiel record*, but he cannot plead anything contrary to the sheriff's return, nor anything which he might have pleaded in the original action.[4] In an action upon the judgment of a sister state, a plea to the jurisdiction is insufficient which alleges that defendant was not a resident of the state in which the judgment was rendered; the averment should be that defendant was not in that state.[5]

§ 729. **Actions between landlord and tenant.**— In an action on the covenants of a lease, an answer which sets up a surrender and acceptance of the unexpired term must state that the surrender was accepted in discharge of the covenant.[6] It is not sufficient to state merely that the tenant delivered up the possession of the premises to the landlord; there must be a further averment that the landlord accepted the possession and discharged the tenant.[7] An answer which sets forth that plaintiff has already maintained one action against defendant predicated on the lease, and that the recovery in that action embraces a part of the time for which recovery is sought in the present action, constitutes a good defense.[8]

[1] Meyer v. Insurance Co., 73 App. 166.

[2] Clevinger v. Northwestern Ins. Co., 71 App. 73.

[3] Rev. Stat. 1899, sec. 637.

[4] Jeffries v. Wright, 51 Mo. 215; Simpson v. Watson, 15 App. 425; Kennedy v. Bambrick, 20 App. 630.

[5] Wilson v. Jackson, 10 Mo. 330. See also § 703, *ante*.

[6] Thomas v. Cox, 6 Mo. 506.

[7] Kerr v. Clark, 19 Mo. 132.

[8] Kerr v. Simmons, 82 Mo. 269.

§ 730. **In mechanics' lien suits.**— A denial that plaintiff's claim constitutes a lien on the land is sufficient to put in issue the liability of the land to be charged with the lien; but all other facts necessary to constitute the lien will be admitted unless they are specifically denied.[1] Where the petition alleges that plaintiffs were the original contractors, and the answer contains a denial of that fact, but does not set up the limitation prescribed by the statute, defendants cannot be permitted to show that plaintiffs had only four months in which to bring their action, instead of six months.[2]

§ 731. **Actions for services.**— Where the action is by an employee who had been discharged before the expiration of his term of service, if the defendant relies on the defense that he was induced to employ the plaintiff by the fraud of the latter, he must so state in his answer. If he discharged him for improper conduct, he must set forth the facts showing what the impropriety was. If the discharge was for a failure by the employee to do the work which he contracted to do, the answer should state in what particular he failed, and it must appear that the work which he failed to do was such as by his contract of employment he was required to do.[3]

§ 732. **Actions for slander or libel.**— In actions for slander or libel defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances admissible in evidence to reduce the amount of the damages; and, whether or not he proves the justification, he may give in evidence the mitigating circumstances. Matters of justification and mitigation must be separately stated.[4] Under this section mitigating circumstances may be pleaded and are admissible to reduce the amount of the damages, but not to defeat the action.[5] But mitigating circumstances go only to reduce the exemplary damages, and not the actual damages.[6]

§ 733. Where the answer admits the speaking of the words, but does not allege their truth, yet seeks to excuse their utterance, it must specifically and with precision allege the facts which are claimed to excuse the defendant for uttering them. And if the words amount to a charge of larceny, it seems that it should appear

[1] Fitzpatrick v. Thomas, 61 Mo. 515.

[2] Hearne v. Chillicothe & B. R. Co., 53 Mo. 324.

[3] Sugg v. Blow, 17 Mo. 359.

[4] Rev. Stat. 1899, sec. 636.

[5] Trimble v. Foster, 87 Mo. 49.

[6] Callahan v. Ingram, 122 Mo. 355, 374; Lewis v. Humphries, 64 App. 466, 472.

upon the face of the answer that their utterance was accompanied by a statement of facts sufficient to show that no larceny had in fact been committed.[1] In order that defendant may plead facts in mitigation of the damages, it is neither necessary nor proper that the answer should contain an averment of the truth of the alleged slanderous words, since if, in the matter pleaded in mitigation, defendant was required to repeat the slander complained of, it would be an absurd blending of mitigation and aggravation.[2] But an answer setting up a justification must confess the speaking. An answer merely stating that the words spoken are true is not sufficient; it should state the facts constituting the crime or offense imputed, so that an issue, either of law or of fact, may be raised.[3] In a plea of justification to a libel which charged that a person was thought no more of than a horse thief or a counterfeiter, there must be an averment that the defendant was guilty of horse stealing or counterfeiting; it is not sufficient to allege that he was not thought any more of than a horse thief or a counterfeiter.[4] Where the petition alleged that defendant had charged plaintiff with having sexual intercourse with her brother and that pregnancy had resulted, the plea in justification is sufficient if it covered the charge that she had had the intercourse.[5]

§ **734. Action against surety.**— Where a party when sued on a note sets up the defense that he signed the note as a surety, he must set out the name of his principal.[6] If one sued as surety sets up the defense that he had given notice to the creditor under the statute to sue his principal,[7] and that the creditor had failed to sue as required, it need not be averred that the notice was in writing, although the statute requires that it shall be in writing.[8] Where in an action against the surety the answer alleged that plaintiff, well knowing that defendant was only an indorser on the note, extended the time of payment without defendant's consent, this was held to be equivalent to an averment that defendant had written his name on the back of the note as surety for the maker, and that he was discharged by the alleged extension.[9] Where the action is upon the bond of a public administrator, and the surety alleges that he had been discharged by an order of the

[1] Trimble v. Foster, 87 Mo. 49.
[2] Coe v. Griggs, 76 Mo. 619.
[3] Atteberry v. Powell, 29 Mo. 429.
[4] Nelson v. Musgrave, 10 Mo. 648.
[5] Edwards v. Knapp, 97 Mo. 432.
[6] Boatman's Savings Inst. v. Forbes, 52 Mo. 201.
[7] Rev. Stat. 1899. secs. 4500–4502.
[8] Coats v. Swindle, 55 Mo. 31.
[9] Noll v. Oberhellman, 20 App. 336.

probate court in accordance with the provisions of section 4510 *et seq.*,[1] and the answer avers that his application for discharge was made "after due notice as required by law," and then sets out the record of the proceedings upon the hearing of the application, which contained a recital that the principal was present, this satisfies the requirements of the law as to notice.[2] To an action on the bond of a bank teller a surety may properly plead that when he executed the bond the principal was in the service of the bank as receiving teller, and that the bank held him out to the sureties as a faithful officer, when in fact he was then in default to the bank and such fact was known to the bank, but was fraudulently concealed from the sureties in order to induce them to execute the bond. And the answer is not vitiated by the fact that it further contains an allegation of certain evidential facts, which in themselves were insufficient to show that the bank knew of the teller's previous embezzlement.[3]

§ **735. Actions for trespass.**— A plea of justification of a trespass *de bonis asportatis* must, under the common law, have admitted the right of property in the plaintiff. And where the justification was that defendant took the property as constable in levying an execution, it was not necessary to set out the judgment in the plea, or to show that the execution followed the judgment, or that the property taken had been sold.[4] The same rule would probably apply in proceedings under the Code. It is also held in the above case against constable, who had committed a trespass in levying an execution, that an allegation of the petition that defendant detained and converted the property was mere matter of aggravation, which did not require an answer. As possession without title is sufficient to maintain an action of trespass, at least as against a wrong-doer, an answer which avers title in another is bad.[5]

[1] Rev. Stat. 1899.

[2] State ex rel. v. Nolan, 99 Mo. 569.

[3] Third Nat. Bank v. Owen, 101 Mo. 558. It was further decided in that case that the answer need not set out the means by which the plaintiff bank acquired knowledge of the teller's dishonesty.

[4] Burton v. Sweaney, 4 Mo. 1.

[5] Richardson v. Murrill, 7 Mo. 333.

# CHAPTER XXVII.

## PLEAS IN ABATEMENT.


§ 736. The rule.
737. Nature of a plea in abatement.
738. What the plea must show.
739. Effect of the plea.
740. Waiving matter of abatement.
741. Joining a plea in abatement with a plea to the merits.
§ 743. Question of jurisdiction must be first tried.
744. The rule in attachment cases.
746. Another action pending.
747. Cases explaining the rule.


§ **736. The rule.**— Under the common law there was a well recognized distinction between pleas in bar and pleas in abatement. The general rule was that whatever matter of defense shows that plaintiff can have no cause of action must be pleaded in bar; but that which merely defeats the present suit, and does not conclude the plaintiff from maintaining a suit upon the cause stated, should be pleaded in abatement. And the Code has not changed the law in this respect.[1] If the fact that a suit was brought in a county where the defendant did not reside, and that he was served with summons in the county in which he did reside, were called to the attention of the court by a timely plea in abatement, the only effect of it would be to defeat that particular suit, and to compel the plaintiff to sue where the defendant resided, or to have summons awarded and served on some defendant who did reside in the county where the suit was brought.[2] So, too, where there is a misnomer of a party, advantage of that fact must be taken by a plea in abatement; but the only effect of this is to compel the plaintiff to properly name the party, which he may do by amendment in the same suit.[3]

§ **737. Nature of plea in abatement.**— Pleas in abatement are of a dilatory nature. That is, they do not finally settle the right

[1] Kincaid v. Storz, 52 App. 564. Yet, as will be seen hereafter (see § 741, *post*), this distinction has been deprived of very much of its importance by reason of the fact that under the present ruling of our courts pleas in abatement and in bar are to be included in the same answer.

[2] Kincaid v. Storz, 52 App. 564.

[3] Hanley v. Blanton, 1 Mo. 49; Thompson v. Elliott, 5 Mo. 118; Swan v. O'Fallon, 7 Mo. 231; Martin v. Barron, 37 Mo. 301; Green v. Supreme Lodge, 79 App. 179.

of the plaintiff to recover on his cause of action, but only go to show that he has adopted an improper method, or the wrong form, or that he has selected the wrong time, in his attempt to enforce his right, or that in some other technical respect he has mistaken his remedy or has failed to properly present his case. As the objections raised by a plea in abatement are of a dilatory character, the plea in abatement must be interposed in the proper time and manner, or the objections will be waived.[1]

**§ 738. What the plea must show.**— Dilatory defenses, such as a plea in abatement, are not favored by the courts and are to be strictly construed. And it is said that such a plea must give the plaintiff a better writ. That is, it must state specifically, and not in general terms, what is the defect which renders the plaintiff's writ or his petition insufficient. If, for instance, the plea is based upon a defect of parties, the plea in abatement must state precisely who should be made parties. If the plea raises the objection that the plaintiff has not legal capacity to sue, it should point out the specific ground of the incapacity.[2] In order to raise the objection that there is a misjoinder of parties plaintiff, there must be an objection in terms to the petition on that ground; it is not sufficient that the answer sets forth facts which show that the alleged cause of action of plaintiffs who sue jointly is not a joint but a several cause of action.[3] Where the plea in abatement goes to the jurisdiction of the court or officer, it is not sufficient to allege that the court or officer did not have jurisdiction, or that the summons was insufficient; the pleading must set out facts showing the lack of jurisdiction or the insufficiency of the summons.[4]

**§ 739. Effect of the plea.**— Where a plea in abatement on account of a misnomer is sustained, this does not entitle defendant to have the summons quashed. As stated in the preceding section, defendant must give the plaintiff a better writ; and when the proper name is thus obtained, the court may permit plaintiff to correct the name in his petition and in the summons. Defendant is, of course, entitled to the accrued costs.[5]

**§ 740. Waiving matter of abatement.**— If in a partition suit it appears upon the face of the petition that the suit has not been

[1] Kincaid v. Storz, 52 App. 564.

[2] Shockley v. Fischer, 21 App. 551. An instance of such a plea will be found in Montgomery v. Tipton, 1 Mo. 446.

[3] Donahue v. Bragg, 49 App. 273.

[4] Hopkins v. Huff, 67 App. 394.

[5] Green v. Supreme Lodge, 79 App. 179.

brought in the proper county, because not brought in the county in which the lands lie or a majority of the parties reside,[1] defendant is not compelled to demur on that ground, but may in his answer plead to the jurisdiction, and he will not be held to have waived the objection because he failed to demur. And this rule obtains, although the proceeding is brought in a court which has an inherent jurisdiction over the subject-matter, and the only question is that of the forum.[2]

§ 741. **Joining a plea in abatement with a plea to the merits.**— Under the earlier decisions in this state a plea in bar on the merits was held to waive all matters of abatement.[3] And the rule especially applied to actions brought by attachment.[4] But this rule no longer prevails even in attachment suits, for in the later cases it is held that, as it is contemplated by the Code[5] that only one answer shall be filed, and that such answer shall contain whatever defense or defenses the defendant may have, the common-law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits, is abrogated. Therefore a plea whose effect is only to abate the suit, as, for instance, a plea of non-joinder of parties, may be united in the same answer with matter in bar.[6] And defendant may plead to the merits without foregoing the benefit of his plea to the jurisdiction.[7] So far has this rule been carried that it is now held that not only may a plea in abatement be joined in the same answer with a plea in bar, but that, as only one answer is allowable, and that must contain all the defenses which the defendant desires to set up, he must combine his plea in abatement with his plea to the merits, and if he pleads only one, and is defeated on that, he cannot claim the right to resort to the other.[8] And this requirement applies even to a proceeding by *quo warranto*.[8] But if a

[1] Rev. Stat. 1899, sec. 4374.

[2] Johnson v. Detrick, 152 Mo. 243.

[3] Fugate v. Glasscock, 7 Mo. 577; Bowen v. Lazalere, 44 Mo. 383; Rippstein v. St. Louis Mut. Life Ins. Co., 57 Mo. 86.

[4] Fordyce v. Hathorn, 57 Mo. 120; Audenreid v. Hull, 45 App. 202.

[5] Rev. Stat. 1899, secs. 596, 604, 605.

[6] Little v. Harrington, 71 Mo. 390.

[7] Byler v. Jones, 79 Mo. 261. This last case is cited and followed in Young Men's Christian Ass'n v. Dubach, 82 Mo. 480, in which Moody v. Deutsch, 85 Mo. 237, is disapproved. The rule is also followed in Cohn v. Lehman, 93 Mo. 574; Christian v. Williams, 111 Mo. 429, and Johnson v. Detrick, 152 Mo. 243, and by the courts of appeals in Roberts v. State Ins. Co., 26 App. 92; McIntire v. Calhoun, 27 App. 513, and Houston v. Woolley, 37 App. 15.

[8] State v. Vallins, 140 Mo. 523.

plea in abatement to the jurisdiction of the court over the person of defendant has been decided adversely to the defendant, he cannot, after taking a change of venue, raise the question in the court to which the case is transferred by uniting in his answer a plea to the merits with a plea to the jurisdiction, since this was such an appearance as waived any objection to the process of service, and admitted the jurisdiction of the court over the person.[1]

§ 742. There is one decision of the supreme court which is apparently not in harmony with those just cited. In *Spillane v. Mo. Pac. R. Co.*,[2] it was apparent upon the face of the petition that the plaintiff had not legal capacity to sue, since he sued as guardian of an infant child, and there was no averment that he had given bond as such or that he was legally qualified. A demurrer was interposed on that ground but was overruled, and defendant answered over. The court held that by answering over he waived the plea in abatement. Nothing is said in the opinion as to what would have been the effect if defendant had included in his answer an averment that plaintiff having failed to give bond had no authority to maintain the action. And it must be assumed, I think, in view of the present state of the law on this subject, that defendant might have done so, and might thus have avoided a waiver of his ground of abatement.

**§ 743. Question of jurisdiction must be first tried.**— If a defense to the merits is united in the same answer with a plea to the jurisdiction, the court ought to settle the question of jurisdiction before permitting a trial on the merits.[3]

**§ 744. The rule in attachment cases.**— The above rule that pleas in abatement may be joined in the same answer with pleas in bar was originally held not to apply to suits by attachment. In the first place, the statute apparently contemplates that the answer to the merits shall be a separate pleading from that in abatement. Section 406[4] provides that defendant may file a plea in the nature of a plea in abatement, which must be verified, and which puts in issue the truth of the matter alleged in the affidavit on which the attachment is sued out. Section 407[4] provides for a trial of this plea in abatement, and it further provides that after the finding on this issue there shall be, or at least may be,

[1] Baisley v. Baisley, 113 Mo. 544.
[2] 111 Mo. 555.
[3] Byler v. Jones, 79 Mo. 261; Thompson v. Bronson, 17 App. 456.
[4] Rev. Stat. 1899.

a trial on the merits. In 1852, shortly after the adoption of the Code, the question was raised whether the plea in abatement and the plea to the merits could properly be joined in the same pleading by defendant, and it was held that it could not be done.[1] It was also held in that case that by filing a plea to the merits at the same time with the plea in abatement the latter plea was waived. In *Fordyce v. Hathorn*[2] this decision was followed, that being a case of attachment under the landlord and tenant act; and it was also followed by the St. Louis court of appeals in *Audenreid v. Hull*,[3] and by the Kansas City court of appeals in *Houghland v. Dent*,[4] and as late as 1897 in *State ex rel. v. Hopper*.[5] But this position has now been abandoned. In a case decided by the supreme court as early as 1880,[6] that court, in passing upon the general question whether pleas in abatement might be joined in the same answer with pleas in bar, and holding that they might be, expressly overruled *Fordyce v. Hathorn*,[7] though the *Little* case was not one brought by attachment; and yet it is impliedly stated in the opinion that the earlier case of *Cannon v. McManus*[8] was properly decided. But the question must now be considered settled by the decision, in 1895, of the case of *Coombs Commission Co. v. Block*,[9] where Barclay, J., reviews the authorities, and declares the law to be that there is no sound distinction or difference observable in this regard between actions begun by ordinary summons and those having an attachment feature. "We can discern no substantial ground," he says, "upon which to maintain a distinction between a plea to abate an attachment and a plea of matter intended to abate an ordinary civil action, with respect to the right to plead the same without thereby waiving the right to defend upon the merits also. The reasons which permit the one under our system of pleading should likewise permit the other." (p. 676.)

§ 745. It can therefore be stated as the law of Missouri that in all cases a plea in abatement may be joined in the same answer with a plea in bar; and it would follow from the reasoning of

[1] Cannon v. McManus, 17 Mo. 345.
[2] 57 Mo. 120.
[3] 45 App. 202.
[4] 52 App. 237.
[5] 72 App. 171. The following decisions of the supreme court, too, expressly affirm the doctrine: Green v. Craig, 47 Mo. 90; McDonald v. Fist, 60 Mo. 172.
[6] Little v. Harrington, 71 Mo. 390.
[7] 57 Mo. 120.
[8] 17 Mo. 345.
[9] 130 Mo. 668.

the more recent decisions that the two pleas must be set forth in the same pleading.[1] Even when the rule was otherwise, it was so far modified in attachment suits that if the defendant filed a plea in abatement and, the plea having been overruled and the ruling duly excepted to, he then pleaded to the merits, he did not lose the benefit of his plea in abatement.[2]

§ **746. Another action pending.**— One of the grounds mentioned in our statute for abating a suit is that there is another action pending in this state between the same parties for the same cause of action.[3] If the answer sets up the pendency of another action, the statements as to the two actions must be set out with precision, so that the court may see upon the face of the answer that the two actions are between the same parties and for the same cause of action.[4]

§ **747. Cases explaining the rule.**— The pendency of a suit to foreclose a mortgage for the non-payment of one instalment of the note secured thereby will not abate a subsequent suit to foreclose the same mortgage, based upon the non-payment of the next instalment of the same note. The causes of action are as separate and distinct as they would be if they were founded on two separate notes.[5] While a suit for partition was pending in one court, another petition for partition of the same land was filed in a different court, and the latter proceeding was prosecuted to final judgment. Afterwards a judgment of partition was rendered in the first suit. In the trial of a subsequent cause an attempt was made to impeach the judgment in the second suit on the ground that the first suit was pending at the time, and it was held that such an objection could only be made by a plea in abatement filed in the second suit, and could not be collaterally taken advantage of in a subsequent cause.[6]

§ 748. If the plea of another suit pending between the same parties for the same cause of action is set up as a defense, plaintiff may dismiss the first one and proceed with the second; and the fact of such a dismissal may be set up in a reply, or even in an amended reply.[7] While the fact that another suit has been

[1] In Coombs Commission Co. v. Block, 130 Mo. 668, it is held, however, that the defendant in an attachment suit is not bound to plead to the merits until his plea in abatement is disposed of, although he may do so if he desires.

[2] Norvell v. Porter, 62 Mo. 309.

[3] Rev. Stat. 1899, sec. 598, subd. 3, together with sec. 602.

[4] Bowles v. Voss, 3 App. 571.

[5] Jacobs v. Lewis, 47 Mo. 344.

[6] Bernecker v. Miller, 44 Mo. 102.

[7] Warder v. Henry, 117 Mo. 530.

brought in this state by the same plaintiff against the same defendant for the same cause of action, and that such suit is still pending, constitutes a ground for abating the second suit, yet the subject-matter of such pending suit may be pleaded as a set-off by the plaintiff therein, if, during its pendency, he is sued by his adversary, provided the subject-matter of the first suit is such as to constitute under the statute a proper subject of set-off in the second suit; and if judgment has been rendered in the first suit that judgment may be set off in the second.[1]

[1] Gunn v. Todd, 21 Mo. 303.

## CHAPTER XXVIII.

### THE REPLY.


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**§ 749. The statutory provisions.**— Where the answer contains new matter, plaintiff must reply to such new matter within such time as the court by rule or otherwise shall require, denying generally or specifically the allegations controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, and without repetition, any new matter, not inconsistent with the petition, constituting a defense to the new matter in the answer.[1] If the answer contains a statement of new matter, and plaintiff fails to reply or demur to it within the time prescribed by the rule or order of court, such judgment must be rendered as defendant is entitled to upon the new matter stated in his answer; and, if necessary, a writ of inquiry of damages may issue.[2] Defendant may, within three days after the reply is filed, demur to the new matter in it;[3] but if he does not demur to it, the new matter in the reply is to be deemed controverted by the defendant as upon a direct denial or avoidance.[4] Under the above sec-

[1] Rev. Stat. 1899, sec. 607.
[2] Rev. Stat. 1899, sec. 608.
[3] Rev. Stat. 1899, sec. 607.
[4] Rev. Stat. 1899, sec. 628.

tion[1] as it now stands, plaintiff may reply generally, or he may assert a want of knowledge or information sufficient to form a belief; but this last clause of the section has been in force only since 1875.[2]

**§ 750. When a reply is required.**— A reply is required only when there is in the answer a statement of new matter constituting a defense or a counter-claim.[3] If the averments of the answer are but denials of the allegations of the petition, no reply is required.[4] If the answer avers conclusions of law from facts already stated in the petition, it does not set up new matter and it does not require a reply.[5] And the statement in an answer of a conclusion of law, as distinguished from matter of fact, is not admitted by the failure of plaintiff to reply.[6] Where the new matter in the answer does not constitute a valid defense it is unnecessary for plaintiff to reply.[7]

**§ 751. Demurrer or reply.**— Section 600[8] provides that the defendant may demur to the whole petition or to any one or more of the alleged causes of action therein, and may answer the residue; and section 609[8] provides that the reply shall be governed by the rules relating to answers, and that demurrers to the answer or reply shall be governed by those relating to demurrers to petitions. If plaintiff demurs to a special defense after he has filed a reply to it, this will be deemed a withdrawal of the reply so far as such defense is concerned;[9] since, as has already been stated, a party cannot both demur and answer to the same part of the pleading at the same time.[10]

**§ 752. Curing defect in petition.**— Where, in an action against the drawer of a bill of exchange, the acceptance was a conditional one, and the petition contained no averments to the effect that the drawer had knowledge that the acceptance was conditional or had in any way waived his right to an absolute acceptance, the defect in the petition is not cured by reason of the fact that the reply contained an averment that, after non-payment of the bill, the drawer, with knowledge of the acceptance and non-payment, agreed to pay it.[11]

[1] Rev. Stat. 1899, sec. 607.

[2] Watson v. Hawkins, 60 Mo. 550; Laws 1875, p. 106.

[3] State ex rel. v. Rau, 93 Mo. 126.

[4] Jordan v. Buschmeyer, 97 Mo. 94.

[5] State ex rel. v. Williams, 77 Mo. 463.

[6] Dix v. German Ins. Co., 65 App. 34.

[7] Jamison v. Springfield, 53 Mo. 224. For a discussion of what is new matter, see ch. XXIII; also § 763 *et seq.*, *post.*

[8] Rev. Stat. 1899.

[9] Henley v. Henley, 93 Mo. 95. In this case the reply was a general denial.

[10] Taber v. Wilson, 34 App. 89.

[11] Taylor v. Newman, 77 Mo. 257.

**§ 753. Failure to file reply.**— Where a replication is required and none is filed, and no default is taken for want of a reply, the verdict will not be set aside by reason of such omission; if necessary, a reply by way of a general denial may be filed *nunc pro tunc* in aid of the verdict.[1] But this rule does not apply where defendant pleads a counter-claim or set-off.[2]

**§ 754. What is new matter.**— The general rule is that any fact which avoids the action, and which plaintiff was not bound to prove in the first instance in support of it, is new matter; but a fact which merely negatives the averments of the petition is not new matter, and need not be replied to.[3] If the facts stated in the answer show a non-liability, even though the facts stated in the petition are true, they are new matter; but if the facts so stated simply show that the facts stated in the petition are not true, then they are not new matter though stated in an affirmative form, and they are admissible in evidence under a general denial.[4] Allegations of fact in an answer which in no degree tend to overcome the cause of action set out in the petition do not constitute new matter requiring a reply; such matters are purely surplusage.[5] An averment which is merely a conclusion of law is not new matter.[6]

§ 755. If the matter in the answer is not properly new matter, it is not made such by the fact that a reply is filed to it.[7]

**§ 756. What is new matter — Illustrations.**— The following cases will serve to illustrate what the courts have considered new matter in such a sense as to require a reply. Where the answer sets up an account of payments made by a defendant to plaintiff, it has been held that this is a plea of payment, that it is not new matter and is not confessed by a failure to file a reply.[8] But in *Ennis v. Hogan*[9] suit was brought against a stockholder of a dissolved corporation to compel him as such to satisfy an unpaid

[1] Foley v. Alkire, 52 Mo. 317; Heath v. Goslin, 80 Mo. 310; Turner v. Butler, 126 Mo. 131.

[2] Gunn v. Todd, 21 Mo. 303.

[3] State to use v. Williams, 48 Mo. 210; State ex rel. v. Rau, 93 Mo. 126; Nelson v. Wallace, 48 App. 193. In this connection chapters XXI and XXII should be consulted, the principles involved being the same.

[4] State ex rel. v. Rau, 93 Mo. 126; Blatz v. Lester, 54 App. 283.

[5] Dix v. German Ins. Co., 65 App. 34.

[6] State ex rel. v. Williams, 77 Mo. 463. Consult also ch. XXIII.

[7] Emmert v. Meyer, 65 App. 609.

[8] Holzbauer v. Heine, 37 Mo. 443. It is doubtful whether this decision correctly states the law; it is certainly the safest course to reply to an answer pleading payment.

[9] 47 Mo. 513.

debt of the corporation,[1] and defendant, after admitting the insolvency and dissolution of the corporation, alleged that its stock had been paid up in full, and that in addition thereto he had paid corporation debts to an amount exceeding the total amount of his stock. It was there held that this was new matter which required a reply. The ground of the distinction as stated by the court is that defendant in this latter case did not aver payment of the debt sued for, but the payment of other liabilities, whereby his liability as stockholder had been discharged. So, too, where the plea of payment was set up to an action founded on a judgment rendered in the state of Kentucky, and there was an averment that by the law of that state such a plea to such a declaration is good, this raises the issue as to what the law of Kentucky was, and requires a reply.[2] Where an action is brought against a firm to recover a partnership debt, and one of the partners sets up in his answer a dissolution of the partnership and payment of the indebtedness by the other partner, alleging at the same time that the other partner was on the dissolution accepted by plaintiff as the sole debtor, the answer contained such new matter as must be replied to.[3]

§ 757. A plea of an accord and satisfaction is new matter and requires a reply.[4] The plea of justification in an action of slander is not only new matter, but it goes to the plaintiff's entire cause of action; if it remains undenied by a reply, defendant is entitled to judgment.[5]

§ 758. An action was brought upon a policy of insurance which contained a condition that the insured should, if requested, exhibit to the insurer his books and accounts. The petition contained an allegation that plaintiff had performed all conditions precedent. It was held that this did not include an allegation that he had complied with the condition as to the exhibit of his books, and if the answer avers that request was made upon the plaintiff for the exhibition of his books, and that he had neglected or refused to exhibit them as requested, this constitutes new matter which must be replied to.[6] In another action upon a policy of insurance the petition alleged that plaintiff's dwelling-house, which was covered by the policy, was totally destroyed by fire. The answer averred that the house was blown down, and that

[1] Rev. Stat. 1899, sec. 987.
[2] Hutchison v. Patrick, 3 Mo. 65.
[3] Cordner v. Roberts, 58 App. 440.
[4] Robinson v. Suter, 15 App. 599.
[5] Nelson v. Wallace, 48 App. 193.
[6] Mueller v. Putnam F. Ins. Co., 45 Mo. 84.

the fire was communicated to the materials from the stove. The reply alleged that plaintiff did not know whether the fire was communicated from the stove or from lightning. It was held that the answer was in legal effect a denial of the allegation of the petition, and did not require a reply.[1]

**§ 759. The denial.**— The denial of new matter set up in an answer does not limit the allegations of the petition; the plaintiff's cause of action is still based upon the allegations of the petition,[2] and there is no error in striking out so much of the reply as has already been embodied in the petition.[3] Where the answer contains an averment that the plaintiff knew certain facts, this does not tender an issue as to the existence of such facts; and if plaintiff denies that he knew of the existence of the facts, this is not by implication an admission that the facts actually existed.[4]

**§ 760. Forms of denial which are insufficient.**— When the answer contains numerous averments of fact in several counts, and the reply pleads specially to some of these averments, and then "denies each and every allegation of the answer not herein admitted or otherwise pleaded to," it is bad.[5] But such pleading cannot be considered a nullity, and if no advantage is taken of its defects before trial, it will then be held sufficient.[6] If the suit is to cancel a sheriff's deed upon the ground that it is a cloud upon plaintiff's title, and the answer sets up new matter, a reply is insufficient which denies "each and every allegation and statement therein which is in any way inconsistent with the allegations in the petition," and "especially denies all new matter pleaded" in the answer.[7]

**§ 761. General or special denial.**— The questions whether a denial should be general or special, and of what may be shown under a general denial, have been fully considered in chapters XX to XXII, inclusive; little need be added here to what is said in those chapters. As in the case of an answer, so in that of a reply, a mere general denial will not permit the introduction by a plaintiff of new matter in evidence.[8] The rule that an affirma-

[1] Farrell v. Farmers' Fire Ins. Co., 66 App. 153.

[2] Gaty v. Clark, 28 App. 332. See § 763, *post*.

[3] West v. West, 144 Mo. 119.

[4] Thomas v. Liebke, 13 App. 389. As the denial in the reply and the denial in the answer are in the main governed by the same principles, the reader should consult chapters XX to XXIII, inclusive, in this connection.

[5] Long v. Long, 79 Mo. 644; Collins v. Trotter, 81 Mo. 275.

[6] Collins v. Trotter, 81 Mo. 275.

[7] Young v. Schofield, 132 Mo. 650.

[8] Judy v. Duncan, 21 App. 548.

tive defense must be clearly and distinctly set forth is applicable to the reply, since under a general denial of an affirmative defense set forth in the answer, plaintiff can only try such questions as are necessary to sustain defendant's case.[1] Where the allegation of the answer was "that plaintiff without just cause discharged the defendant," and the reply was that plaintiff "denies that he discharged the defendant without just cause," the reply went to the whole averment of the answer, and put in issue both the fact of the discharge and its justice.[2] In an action to recover for injury to stock by a railroad company, based upon the failure of the defendant to erect a fence along the line of its road, the answer alleged that plaintiff had himself agreed to erect such fence and had failed to do so, and that it was in consequence of his failure to erect the fence that his stock went on the road. By the replication plaintiff denied that he was bound by any contract with defendant to build the fence on his own land on the line of said railroad track, as stated by defendant in its answer. It was held that, while this might be construed to be a negative pregnant, yet where the contract was thus collaterally set up in the pleading, a denial of the kind made in the reply was sufficient to require the party setting up the contract to produce it on the trial, that its terms might be construed by the court.[3]

§ 762. The petition stated a cause of action for personal injuries based upon the negligence of the defendant, and the answer contained a general charge of contributory negligence, without setting out the specific acts of negligence which were relied upon. It was held that this charge of contributory negligence was fully met by a general denial.[4] Where the defense of the statute of limitations is interposed by a defendant, and plaintiff relies on matters in avoidance of the plea, he must plead such matters specially; he cannot give them in evidence under a general denial in his reply.[5] Under a general denial, plaintiff will not be permitted to prove a waiver or an estoppel.[6]

§ 763. **Pleading new matter in reply.**— Plaintiff cannot recover on a cause of action which is stated only in his reply, and

[1] Flint Mfg. Co. v. Ball, 43 App. 504.

[2] Kimberlin v. Short, 24 App. 643. That our courts seem to be unwilling to condemn the vice of a negative pregnant has already been stated. See §§ 205–207, 540, 543, *ante*.

[3] Ells v. Pacific Railroad, 55 Mo. 278.

[4] Scott v. Smith, 133 Mo. 618.

[5] Moore v. Granby Mining & Smelting Co., 80 Mo. 86; Zoll v. Carnahan, 83 Mo. 35.

[6] Whiteside v. Magruder, 75 App. 364.

not in his petition.[1] He cannot amend his petition by a reply.[2] Where in an action of trespass defendant answers that he seized the goods as constable under an execution, and plaintiff replies that the property seized was exempt, he being the head of a family, the reply need not set up the facts which constitute plaintiff the head of a family;[3] nor need the reply allege that plaintiff was at the time residing in this state.[4]

**§ 764. Defective pleading of new matter.**— Defendant cannot take advantage of a defective pleading of new matter in the reply by an objection at the trial to the introduction of any evidence; he must reach the defect by a special demurrer, or better, by a motion to strike out.[5]

**§ 765. Pleading new matter — Fraud.**— When the action is based upon personal injuries suffered by the plaintiff, and the defendant pleads a duly-executed release, can plaintiff avoid such defense by setting up in his reply that the release was procured by fraud?[6] In *Girard v. St. Louis Car Wheel Co.*,[7] this question is answered in the affirmative; and in *Mateer v. Mo. Pac. R. Co.*,[8] such was the course taken. But as the supreme court rested its decision in the case last cited on the ground that there was no evidence of fraud, the question above suggested was not noticed. However, in *Hancock v. Blackwell*,[9] the question was raised before the supreme court *in banc*, and it was declared that plaintiff cannot in an action at law reply fraud to an answer setting up a release of the cause of action; he must proceed in equity to have the release set aside; though it was held that he might amend his petition, so as to embrace a count in equity for the purpose of

[1] Stepp v. Livingston, 72 App. 175; Crawford v. Spencer, 36 App. 78.

[2] McMahill v. Jenkins, 69 App. 279. Consult also the cases on Departure, § 768 *et seq.*, *post*.

[3] Duncan v. Frank, 8 App. 286.

[4] State to use v. Hussey, 7 App. 597. A reply to a plea of discharge in bankruptcy will be found in § 697, note 3.

[5] Ricketts v. Hart, 73 App. 647.

[6] The consideration of this question is perhaps unnecessary in view of the provisions of section 654 (Rev. Stat. 1899), which section was enacted at the last revising session of the general assembly. But I have thought it best to state the previous condition of the law, as showing the reason which led to the adoption of the new section. That section provides that whenever a release, composition, settlement or other discharge of the cause of action sued on shall be pleaded in the answer, it shall be permissible to allege in the reply any facts tending to show that such release, composition, settlement or other discharge was fraudulently or wrongfully procured from plaintiff, and the issue shall be submitted to the jury.

[7] 46 App. 79.

[8] 105 Mo. 320.

[9] 139 Mo. 440.

setting aside the release. But when the same case came again before the court *in banc*, under the style of *Courtney v. Blackwell*,[1] it was then held by four out of the seven judges that the issue of fraud in the procurement of a release which is set up in the answer may be raised by the reply; and while plaintiff is at liberty to anticipate such affirmative defense of release by embodying in his petition a count setting up fraud in its procurement, and asking that it be set aside on account of such fraud, he should not be required to take that course. Above all, he should not be relegated to a separate bill in equity for that purpose.[2] In fact, such was the ruling of the supreme court *in banc* in an earlier case, in which there was no dissent.[3] In that case Judge Robinson, speaking for the full bench, says: "It has been repeatedly held in this state, and in fact is a general rule of practice throughout the courts of our country, that the issues raised by a reply, impeaching the integrity of a release pleaded by an answer as having been obtained by fraud, might be tried in an action at law, without a resort to a court of equity for a cancellation of such release." (p. 646.)[4]

**§ 766. Reply to counter-claim.**—Since in respect to a counter-claim or set-off defendant occupies the position of a plaintiff, the plaintiff's reply is in reality an answer to the defendant's counter-claim.[5] Therefore where new matter is set up in the reply, which is responsive to a counter-claim set up by defendant, and which states matters relevant to meet the matter stated in the counter-claim, it cannot be regarded as a departure.[6] A reply may set up a claim by plaintiff against one of several defendants, in addition to the joint claim set up in the petition against all the defendants, when such defendant has set up as a counter-claim a several demand against the plaintiff; and such a reply does not constitute a departure.[7]

**§ 767. Alleging facts occurring subsequent to suit.**—An answer or replication may allege facts which have occurred since

[1] 150 Mo. 245.

[2] 150 Mo., p. 278.

[3] Homuth v. Metropolitan Street R. Co., 129 Mo. 629.

[4] This case is cited in Hancock v. Blackwell, 139 Mo. 440, 455, as authority for the proposition that fraud cannot be pleaded in the reply, but that there must either be an original proceeding in equity to set aside the release, or the same end must be reached by a separate count in the petition. An examination of the Homuth case will show that it is an authority directly to the contrary.

[5] Henderson v. Davis, 74 App. 1.

[6] Coombs Com. Co. v. Block, 130 Mo. 668.

[7] Mortland v. Holton, 44 Mo. 58.

the institution of the suit.[1] This section was not intended to change the office of a reply, which is that of a denial to the matter set up in the answer, or a confession and avoidance of it; plaintiff must recover upon the cause of action stated in his petition, and cannot recover upon one stated for the first time in his reply.[2] Nor does the section change the equitable rule that in a suit in equity the petition may be so amended as to set up a new state of facts arising subsequent to the commencement of the suit, which may entitle plaintiff to the relief he seeks. And if in an equitable proceeding plaintiff's recovery is based upon facts which have developed since the commencement of the suit, and such facts are set up in the reply and are within the general scope of the petition and the relief prayed for, the judgment cannot be reversed because of the stage of the proceedings at which such facts are pleaded.[3]

§ 768. **Departure.**—A departure is an abandonment of the original cause of action for another.[4] The offense is said to occur when in any pleading the party deserts the ground he took in his last antecedent pleading and resorts to another.[5] New matter in a reply, which constitutes a defense to new matter in the answer, is not a departure.[6] A reply which only supplies a necessary averment omitted from the petition is not a departure.[7]

§ 769. **Decisions illustrating the rule as to departure.**—Where the answer contains a statement of new matter constituting a defense to the petition, and the reply sets out new matter as a defense to the new matter in the answer, if such new matter stated in the reply is not inconsistent with the allegations of the petition it is not a departure, and is allowable.[8] The case was one where plaintiff sued for certain rock, which the petition alleged to be situated on certain real estate belonging to defendant, and which it was charged that defendant had converted to his own use. The answer was a general denial, and a special defense to the effect that, when defendant bought the real estate, the rock in question was a part of it by reason of having been built into and annexed as the foundation of a certain building erected thereon. To this new matter plaintiff replied, admitting

[1] Rev. Stat. 1899, sec. 618.

[2] Crawford v. Spencer, 36 App. 78.

[3] Crawford v. Spencer, 36 App. 78. See in this connection § 763, *ante*.

[4] Mortland v. Holton, 44 Mo. 58.

[5] Cravens v. Gilliland, 73 Mo. 524.

[6] Herf Chem. Co. v. Lackawana Line, 70 App. 274.

[7] Ricketts v. Hart, 73 App. 647. But see § 763, *ante*. As to setting up a waiver in the reply consult § 107, *ante*.

[8] Rich v. Donovan, 81 App. 184.

the purchase by defendant and the fact that the rock was built into the foundation of the building; but the reply proceeded to aver that before the purchase of the realty by defendant the rock had been furnished to the person who contracted to erect the buildings for the then owner of the property; that not having paid for the rock so furnished, plaintiff had filed a mechanic's lien against the property; that plaintiff was induced to release said lien upon the promise by the then owner that if plaintiff would leave the rock there until the then owner should sell the premises he should be compensated for the rock, and that plaintiff released the lien relying upon this promise, of which the defendant had notice. It was held that the reply was proper and constituted no departure from the petition.

§ 770. There is also an interesting decision of the supreme court which involves the same principle. Plaintiff brought a plain action in ejectment. Defendant pleaded a general denial, and also filed a cross-bill in which he set up certain deeds of trust in which he was the beneficiary, the execution thereafter of a warranty deed to him by the grantor in the deeds of trust, accompanied by a release of the deeds of trust by defendant, the purchase of a part of the land by defendant under a judgment against the grantor, the subsequent setting aside of the warranty deed by the court, and the purchase by plaintiff of a part of the land under another judgment against the grantor in the deeds of trust. The cross-bill further averred that defendant had been in the possession of the land since the date of the warranty deed to him, and that plaintiff had not offered to pay the debt secured by the deeds of trust. The prayer of the cross-bill was that the satisfaction of the deeds of trust be set aside, and that a lien be given defendant on the land for the taxes paid and the improvements made by him. To this equitable defense plaintiff replied that the deeds of trust set up by defendant had been extinguished, *first*, by the fraud of defendant in accepting the warranty deed and releasing the deeds of trust on the margin of the record; *second*, by the merger of the qualified title acquired under the deeds of trust into an absolute title to so much of the land as defendant had purchased at the sheriff's sale under execution; and, *third*, by payment of the debt secured by the deeds of trust, since the part of the land which plaintiff was not seeking to recover by his action in ejectment was of a value amply sufficient to pay the entire debt thus secured. It was held that this reply was proper and germane to the issues, and that the

equitable defense set up in the answer, and the equities set up in the reply, should first be tried and decided by the court before plaintiff's action at law for possession of the property could be considered. Plaintiff was entitled to have all these questions settled in the one proceeding, and was not to be compelled to resort to a separate proceeding in equity for the relief to which he was entitled.[1]

**§ 771. How the objection of a departure is raised.**—If a reply does constitute a departure, it can only be taken advantage of by a special demurrer or by a motion to strike out; if defendant goes to trial without taking either of these courses, he waives the objection.[2] It follows that a departure is cured by verdict.[3]

**§ 772. Departure—Praying additional or different relief.** Where to an action in ejectment defendant answers that the plaintiff claims under a trustee's deed, which deed was void for the reason that the trustee had failed to follow the requirements of the deed of trust, plaintiff may in his replication pray for a judgment of foreclosure and a sale of the land, and the court may properly render a decree in accordance with such prayer.[4] A claim for an instalment of rent which has fallen due since the commencement of the action may be set up in the replication.[5]

**§ 773. Same—Character of suit not changed.**—An action at law upon a bond of an executor will not be changed into an equitable proceeding by reason of the fact that the reply contains a prayer for equitable relief.[6]

**§ 774. Departure—Claiming additional damages.**—Under section 618,[7] which provides that an answer or replication may allege facts which have occurred since the institution of the suit, it is proper to allege in the reply any new matter which merely enlarges the extent of the relief sought, by stating a continuance of the same wrong. Thus, in *St. Joseph Union Depot Co. v. Chicago, R. I. & Pac. R. Co.*,[8] which was an action to recover for the use and occupation of plaintiff's depot, the petition prayed for damages in the sum of $4,800, and it was held that the reply

[1] Martin v. Turnbaugh, 153 Mo. 172.

That a reply to a counter-claim cannot be regarded as a departure, see § 766, *ante*.

That plaintiff cannot amend his petition by reply, see § 763, n. 2, p. 395.

[2] Herf Chem. Co. v. Lackawana Line, 70 App. 274.

[3] Mortland v. Holton, 44 Mo. 58.

[4] White v. Rush, 58 Mo. 105. See also § 770, *ante*.

[5] St. Joseph Union Depot Co. v. Chicago, R. I. & Pac. R. Co., 131 Mo. 291.

[6] State ex rel. v. Jones, 131 Mo. 194.

[7] Rev. Stat. 1899.

[8] 131 Mo. 291.

might properly enlarge this prayer for damages, so as to enable plaintiff to recover the sum of $3,000 in addition, which had accrued as rental between the filing of the petition and the date of filing the reply.

§ 775. **Departure — Cases in which the question has been passed upon.**— The following are instances of rulings on the question of departure: In an action on a collector's bond the state alleged that the collector had collected the sum of $19,478 which he had failed to pay over to the state. The defendant's plea admitted that the collector had received the sum stated in the declaration and averred that he had paid the sum into the state treasury, and that this was all the money collected by him during the continuance of his office. To this plaintiff replied, denying that the sum mentioned was all the money collected by the collector during the continuance of his office, and such reply was held to be a departure.[1] Where, in an action of trespass, defendant answers that he seized the goods as constable under an execution, and plaintiff replies that he was the head of a family and that the goods were exempt and were claimed by him as such, there is no departure.[2]

§ 776. Where the petition alleged a direct undertaking on the part of defendant and the reply sought to charge him as a guarantor, this was a clear case of departure.[3] So where the petition alleged that a note was executed by defendant and others as principals, and the reply charged defendant as surety, this was a departure.[4]

§ 777. Where the action is against a corporation for damages for refusing to transfer stock on its books, and the petition alleges that the plaintiff owns the stock, the fact that the reply sets up a special ownership as pledgee does not constitute a departure.[5] If the petition declares for the price of goods sold, and the answer sets up an agreement which entitled defendant to a reduction in the price, a reply stating the agreement differently and alleging a breach of it, but denying all the other allegations of the answer, is not a departure.[6] A petition set forth a contract which obligated plaintiff to furnish a certain abstract of title as a condition to his right of recovery. In the reply this

[1] State v. Grimsley, 19 Mo. 171.
[2] Duncan v. Frank, 8 App. 286.
[3] Philibert v. Burch, 4 App. 470.
[4] Magruder v. Admire, 4 App. 133.
[5] Merchants' Nat. Bank v. Richards, 74 Mo. 77.
[6] Auchinclass v. Frank, 17 App. 41.

obligation was denied, and plaintiff alleged an agreement by the defendant, as a part of the contract, to forego his right to the abstract. This was held to be a departure.[1]

§ 778. If plaintiff files a bill to enforce specific performance of a written contract, and in his reply sets up an alleged estoppel, this constitutes a departure.[2] A suit was brought for an accounting and settlement of the affairs of a partnership, which had been before the institution of the suit dissolved by mutual consent. The answer admitted the former existence of the partnership and its dissolution, but alleged that there had been a full and final settlement of its affairs. Plaintiff in the reply admitted, by not denying, that the settlement had been made, but sought to avoid such settlement by alleging his sickness at the time and his inability to examine the partnership books, and by averring that there had been omissions of charges which should have been made against defendant and a failure by defendant to render a just and true account of the partnership property; but there was no allegation of fraud in the settlement. It was held that the plaintiff should have set forth this settlement in his petition, and asked for a relief from it upon equitable grounds, and that his reply constituted a departure.[3]

§ 779. Where the petition is on a promissory note in the ordinary form, alleging its execution by defendant, and the answer is a general denial, plaintiff may in his reply plead a ratification; and such ratification does not constitute a departure, since ratification is only another method of execution.[4] So, where plaintiff, in his petition, alleged that defendant converted his horses, and in his reply alleged that defendant's agent converted the horses, and that defendant, with full knowledge, ratified the agent's act, the reply did not constitute a departure, since the agency may be established either by prior authorization or by subsequent ratification.[5]

§ 780. *Lemon v. Chanslor*[6] was an action for injuries to plaintiff caused by the breaking down of a hack. It was alleged in the answer that the hack was drawn by well-trained horses and

[1] Randolph v. Frick, 57 App. 400.

[2] Hill v. Rich Hill Coal M. Co., 119 Mo. 9.

[3] McMahill v. Jenkins, 69 App. 279.

[4] Cravens v. Gilliland, 73 Mo. 524.

[5] McLachlin v. Barker, 64 App. 511. As to pleading waiver in reply, see § 107, *ante*.

[6] 68 Mo. 340.

carefully driven by a competent driver, and that it was not overloaded. This part of the answer plaintiff moved to strike out, and, upon his motion being overruled, he filed a reply which raised the issue that the hack was overloaded. It was held that, if this constituted a departure in pleading, defendants were responsible for it, by reason of the fact that they tendered such issue in their answer, and that they should not be heard to complain of it.

## CHAPTER XXIX.

### RULES GOVERNING INTERPLEAS.

§ 781. What an interplea must show.
782. The answer.
783. Verification of interplea.

**§ 781. What an interplea must show.**— Where one files a bill of interpleader it is not sufficient for him to state that the defendants make conflicting claims to the same fund which is in his hands as a stakeholder, and that plaintiff does not know to which of them to pay the fund; the bill will be demurrable unless it states the nature of the conflicting claims sufficiently to show a color of right to the fund on the part of each claimant.[1] And if the stakeholder is sued by one of the claimants, he may in his answer set up such facts as will constitute a good bill of interpleader, and may pay the fund into court, and ask that the other claimant be made a party defendant to contest his right with the plaintiff.[2] A member of a benefit association assigned his certificate, and after his death his administrator demanded the payment of the certificate, and upon payment being refused sued both the assignee and the association, asking for possession of the certificate and recovery of the money. Both of the defendants answered setting up the assignment, and the association tendered the money in court, and prayed that the assignee and the administrator be directed to interplead. It was held that this was sufficient as a bill of interpleader, and that it was not necessary that the association should make denial of any of the allegations of the plaintiff's bill.[3]

**§ 782. The answer.**— The answer to an interplea need not allege defendant's indebtedness to plaintiff, if the bill of interpleader itself admits it.[4] Where the interplea is filed in an attachment suit, and avers a transfer of the attached property by the attachment defendant to the interpleader prior to the levy thereon, a general denial is insufficient to present the claim that

[1] Robards v. Clayton, 49 App. 608.
[2] Heusner v. Mutual Life Ins. Co., 47 App. 336.
[3] McFarland v. Creath, 35 App. 112.
[4] Meyberg v. Jacobs, 40 App. 128.

the transfer was fraudulent as to the creditors of the attachment defendant.[1]

§ 783. **Verification of interplea.**— The interplea may be verified by the attorney of the interpleader to the best of his knowledge and belief.[2] If the interplea is verified only by the cashier of a bank which was one of the interpleaders, this is sufficient, even though the bank was not a necessary party as interpleader.[3] If an order to interplead has been made, and the interplea has been heard upon its merits, an appellate court will not consider the question whether the chancellor might have properly required an affidavit before making the order.[4]

[1] Claflin v. Sommers, 39 App. 419.
[2] Knapp v. Standley, 45 App. 264.
[3] Scott-Force Hat Co. v. Hombs, 127 Mo. 392.
[4] Merchants' National Bank v. Richards, 6 App. 454; affirmed, 74 Mo. 77.

## CHAPTER XXX.

### ABANDONED PLEADINGS.

§ 784. Regarded as never made.
785. Where a pleading is amended.
§ 786. Pleading withdrawn.
787. Ignored pleading.

**§ 784. Regarded as never made.**— A defense which has been expressly abandoned will be regarded as having never been made.[1]

**§ 785. Where a pleading is amended.**— When a pleading is amended by the filing of a new pleading the functions of the first pleading are at an end.[2] The party abandons the original pleading and all matters alleged in it.[3] But it is held in two later decisions, one of the supreme court and the other of the court of appeals, that any admissions contained in the former pleading are competent evidence against the party who filed it.[4] Where defendant files a supplementary answer and goes to trial on it, he thereby abandons his first answer and all matters of defense which are set up therein and which are not restated in the supplementary answer.[5]

**§ 786. Pleading withdrawn.**— If an answer is withdrawn, the traversable allegations of the petition stand admitted.[6] Admissions in an answer which are in aid of a defectively stated cause of action will avail to uphold the judgment, although such answer is withdrawn after the close of the testimony, and another answer which does not contain the admissions is filed in place of it.[7]

**§ 787. Ignored pleading.**— Where a demurrer has been filed and no judgment is rendered thereon, but the parties afterward go to trial on the merits, it will be presumed that the demurrer

[1] Cockerill v. Stafford, 102 Mo. 57.

[2] Breckenkamp v. Reese, 3 App. 585; Owens Machine Co. v. Pierce, 5 App. 576; Corley v. McKeag, 9 App. 38.

[3] Ticknor v. Voorhies, 46 Mo. 110.

[4] Anderson v. McPike, 86 Mo. 293; Murphy v. St. Louis Type Foundry, 29 App. 541.

[5] Kortzendorfer v. St. Louis, 52 Mo. 204; Rubelman v. McNichol, 13 App. 584.

[6] Price v. Page, 24 Mo. 65.

[7] Enterprise Coal Co. v. Liberty Brewing Co., 20 App. 16. See also the next section.

was withdrawn.[1] So, too, if an answer is filed, and the case afterwards goes off on a demurrer without any notice being taken of the answer, this amounts to a withdrawal of the answer.[2] And if plaintiff, after having filed a reply, demurs to a special defense contained in the answer, he will be deemed to have withdrawn the reply as to such defense.[3] If an amended petition is filed after issue joined, but no further notice is taken on the record of such amended petition, the appellate court will not consider it as forming any part of the case.[4]

[1] Sweeney v. Willing, 6 Mo. 174; Dickey v. Malechi, 6 Mo. 177.

[2] Dunklin County v. Clark, 51 Mo. 60.

[3] Henley v. Henley, 93 Mo. 95.

[4] Collier v. Weldon, 1 Mo. 1.

# CHAPTER XXXI.

## ATTACKING PLEADINGS.


§ 788. General principles.
789. Filing motions.
790. What defects are material.
791. Same — Where there is an agreed statement.
792. Party first in fault.
793. Methods of raising objections.
795. What motions are equivalent to a demurrer.
796. How objection must be stated.
797. As depending upon the time when pleading is attacked.
798. Objecting at trial to the introduction of any evidence.
§ 800. Same — A case illustrating the rule.
801. Demurrer to the evidence.
802. Motion for judgment on the pleadings.
803. Considering the exhibits.
804. Where part of a pleading is stricken out or adjudged bad.
805. Where the attack is not followed up.
806. Effect of pleading over or going to trial.


**§ 788. General principles.**— The rule of pleading under the Code is that, by taking the language in its plain and ordinary meaning, such an interpretation should be given to it as fairly appears to have been intended by the pleader.[1] While it may appear that the rules of pleading are technical and often strict, yet these rules do not rest alone on the arbitrary will of the lawmaker, but are founded in that sense of justice which recognizes the right of every party to a suit to require of his adversary a clear and unequivocal statement of his side of the case. If this right is demanded in due form and in season, it must be heeded as a demand of justice, and it is no answer to say that the demand is technical. But, on the other hand, justice will not allow a party to lie in wait for his adversary, to take his chances on a verdict, and then, if it be against him, profit by the strict technicality of the science of pleading, if a liberal construction can obviate the objection.[2] If a petition utterly fails to set forth

[1] Hickory County v. Fugate, 143 Mo. 71.

[2] Cobb v. Lindell R. Co., 149 Mo. 135; Oglesby v. Mo. Pac. R. Co., 150 Mo. 137. It is said by the supreme court of Wisconsin that no warrant can be found in the authorities for the position that where the objection is seasonably made, as where the petition is challenged by demurrer, such petition may be uncertain and ambulatory, now presenting one phase to the

any facts upon which a judgment against defendant could be based, the court may dismiss the action of its own motion, even after an answer has been filed.[1] After the verdict the court will not construe the petition most strictly against the pleader, but it will be liberally construed with a view to substantial justice.[2]

§ 789. **Filing motions.**— A motion to require a pleading to be made more definite and certain must be filed before the trial begins.[3] And the same rule applies to a motion to strike out imperfect counts from the declaration,[4] and to a motion to elect.[5] If, however, the several counts in a petition contain different consistent statements of the same cause of action, the court may of its own motion compel plaintiff at the close of his evidence to elect on which of the counts he will take the verdict of the jury.[6] Under section 641,[7] all motions filed in term time must be filed at least one day before they may be argued or determined.[8]

§ 790. **What defects are material.**— While it cannot be too strongly asserted that the object of code pleading is not to encourage looseness or vagueness, yet it is a necessary result of the change in method that many defects which were regarded as fatal at common law are not of any serious importance under the Code.[9] A pleading can be attacked by demurrer or preliminary motion only where it is faulty on account of matter apparent on its face.[10] Any obvious clerical error in a pleading will be disregarded.[11] Thus a misspelled word will not vitiate a pleading, where it is apparent what word was intended, and where the word as spelled has the same sound as the word incorrectly spelled. This was held to be true, even in an indictment;[12] and it is needless to say that no stricter rule would be applied in a

court and now another, at the mere will of the pleader, so that it may be regarded as one in tort, or one on contract, or in equity, as he is pleased to name it and the necessities of argument require, and if discovered to be good in any of the turns or phases which it may be thus made to assume, that it must be upheld in that aspect as a proper and sufficient pleading. Kewaunee County v. Decker, 30 Wis. 624.

[1] Staples v. Shackleford, 150 Mo. 471.

[2] Oglesby v. Mo. Pac. R. Co., 150 Mo. 137.

[3] Grabbe v. St. Louis Drayage Co., 42 App. 522.

[4] State to use v. Price, 15 Mo. 375.

[5] Wilson v. St. Louis & S. F. R. Co., 67 App. 443.

[6] Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287.

[7] Rev. Stat. 1899.

[8] Paddock v. Somes, 102 Mo. 226.

[9] Sweet v. Maupin, 65 Mo. 65.

[10] Burdsall v. Davies, 58 Mo. 138.

[11] Gibbs v. Southern, 116 Mo. 204.

[12] State v. Colly, 69 App. 444.

civil cause.[1] Though the statements in a pleading may be defective and uncertain, yet their defects and uncertainties may be cured by evidence given in support of them.[2]

**§ 791. Same — Where there is an agreed statement.**— If at the return term the parties come into court, waive the ordinary pleadings and submit the controversy on an agreed statement of facts, all defects in the petition become immaterial, since the trial is not had on the pleadings but on the statement of facts.[3]

**§ 792. Party first in fault.**— The party first in fault is in no position to take advantage of a defect in the pleading of the other party.[4] And under the code practice, as at the common law, the demurrer goes back to the first pleading; if the petition is insufficient, a demurrer to the answer will be decided in favor of the defendant.[5] For such purpose a motion to strike out the answer or any portion thereof is properly treated as a demurrer, and such motion relates back to the petition, and questions its sufficiency by reason of any substantial error or defect which would render a verdict nugatory if founded upon it.[6]

**§ 793. Methods of raising objections.**— Objections which cannot be properly made either by demurrer or answer must be made by a motion of some kind, either a motion to strike out, or a motion to make more definite and certain, according to the circumstances of the case. All defects of this character are waived, unless objection is taken by a motion of one kind or the other.[7] If the petition shows, at least by intendment, an existing contract between plaintiff and defendant, and a right of recovery thereon, a general demurrer will not lie, but the defect, if there is any, must be reached by a motion to make definite and certain.[8] Where it is designed to raise the objection to a pleading that it is vague and indefinite, it can be done only by special demurrer or by motion to make the pleading more definite.[9] And

[1] In the case just cited the words "lager beer" were spelled "larger beer."

[2] Murphy v. North Brit. Ins. Co., 70 App. 78.

[2] Wagner v. St. Francis Ben. Soc., 70 App. 161.

[4] Matthews v. Boas, 6 Mo. 597.

[5] Potter v. Herring, 57 Mo. 184.

[6] Paxon v. Talmage, 87 Mo. 13.

[7] Sims v. Field, 24 App. 557; Burke Mfg. Co. v. Steamboat Saltzman, 42 App. 85; Harford v. Boyes, 56 App. 139; Haynes v. Trenton, 123 Mo. 326; Walters v. Hamilton, 75 App. 237.

[8] Hirsch v. United States Grand Lodge, 56 App. 101.

[9] Cockerill v. Stafford, 102 Mo. 57; Smith v. Chicago & Alton R. Co., 119 Mo. 246; Lingenfelter v. Phœnix Ins. Co., 19 App. 252.

upon the same principle, the objection to a petition that it states a cause of action imperfectly must be made in like manner.[1]

§ 794. If an answer does not state facts sufficient to constitute a defense, the defect may be reached either by demurrer or by a motion to strike out.[2] Where an answer improperly blends allegations constituting a defense to the cause of action and those relating to a counter-claim, the defect may be reached by a motion to strike out.[3] Where the defect in the petition is one which is cured by verdict, defendant must make his objection either by demurrer or motion, since a plea to the merits waives the objection.[4] The fact that an amended petition sets forth a different cause of action from that declared on in the original petition cannot be reached by demurrer.[5]

**§ 795. What motions are equivalent to a demurrer.**— A motion to strike out all the substantial and material parts of a petition is in effect a demurrer,[6] and as such reaches back and questions the sufficiency of plaintiff's petition.[7] A motion to dismiss on the ground that the petition does not state facts sufficient to constitute a cause of action is equivalent to a demurrer, and confesses the truth of the allegations, denying only their legal sufficiency.[8] And a motion to strike out confesses the facts which are well pleaded.[9] A motion to strike out a plea in abatement is in the nature of a demurrer to the plea.[10] When used for the purpose of striking out a pleading, or some portion of a pleading, a motion is governed by the rules governing demurrers.[11] A motion in the nature of a demurrer cannot be less specific in stating the grounds of objection than a demurrer.[12]

**§ 796. How objection must be stated.**— Where defendant desires by his answer to raise the objection that there is a defect of parties, or that plaintiff has no capacity to sue, or no authority to institute the suit, it is not sufficient to aver merely that there is a defect of parties, or that plaintiff has no authority to institute or maintain the proceeding, but the facts must be set out.[13]

[1] Lynch v. St. Joseph & Iowa R. Co., 111 Mo. 601.

[2] Howell v. Stewart, 54 Mo. 400.

[3] Kinney v. Miller, 25 Mo. 576.

[4] Malone v. Fidelity & Casualty Co., 71 App. 1.

[5] Daudt v. Machens, 13 App. 592.

[6] Austin v. Loring, 63 Mo. 19.

[7] Paxon v. Talmage, 87 Mo. 13.

[8] Butler v. Lawson, 72 Mo. 227.

[9] Wonderly v. Lafayette County, 150 Mo. 635.

[10] Missouri Glass Co. v. Copeland Sewing Machine Co., 88 Mo. 57.

[11] Paddock v. Somes, 102 Mo. 226.

[12] State ex rel. v. Walbridge, 69 App. 657. See also § 802, *post*.

[13] Shockley v. Fischer, 21 App. 551. And it seems that the point can be made by answer only when the peti-

**§ 797. As depending upon the time when the pleading is attacked.**— There are some defects which are fatal to a petition or other pleading, and which can therefore be taken advantage of at any stage of the proceedings. Such defects can be neither waived nor cured. But all mere defects, not substantial or constitutive, may be waived or cured, and will be held to have been waived or cured, unless advantage be taken of them at a proper stage of the proceedings.[1] As has been already stated, justice will not allow a party to lie in wait for his adversary, to take his chances on a verdict, and then, if it be against him, profit by the strict technicality of the science of pleading, if a liberal construction will obviate the objection.[2] For these reasons, where the petition is first attacked after a verdict has been rendered, plaintiff is entitled to the benefit of every reasonable inference from the facts alleged.[3] If the allegations of a pleading are uncertain or vague, the adverse party should seasonably move for their correction.[4] The question whether a pleading is good after verdict, which would not have been held sufficient if timely objection had been made, will be considered in a later chapter.[5] In a suit brought by an infant, the failure of the petition to allege the appointment of a guardian or next friend to prosecute the suit constitutes an objection which goes merely to the legal capacity of the plaintiff to sue, and, if no objection is taken to it before the trial, it is such an imperfection as is cured by the statute of jeofails.[6] If all of several tenants in common do not join in an action of trespass *quare clausum fregit*, defendant must take advantage of that fact before going to trial.[7]

**§ 798. Objecting at trial to the introduction of any evidence.** When the petition fails to state a cause of action, owing to the omission of some essential averment, and its terms are not sufficiently general to comprehend such averment by fair and reasonable intendment, an oral demurrer may be made to the petition at the trial by objecting to the admission of any evidence in support of it.[8] Such a demurrer, however, does not entirely take

tion is on its face sufficient in this regard. Ibid.

[1] Consult chs. XXXVI to XXXIX, inclusive.

[2] Cobb v. Lindell R. Co., 149 Mo. 135.

[3] Davis v. Jacksonville S. E. Line, 126 Mo. 69.

[4] Coombs Commission Co. v. Block, 130 Mo. 668.

[5] See chs. XXXVIII, XXXIX.

[6] Rev. Stat. 1899, secs. 672–3; Lyddon v. Dose, 81 App. 64.

[7] Thompson v. Chicago, R. I. & Pac. R. Co., 80 Mo. 521.

[8] Murphy v. North British Ins. Co., 70 App. 78; Malone v. Fidelity & Cas. Co., 71 App. 1; Jones v. Philadelphia Underwriters, 78 App. 296.

the place of a formal demurrer by pleading, and should not be sustained for a mere informality in the statement of any essential fact.[1] An objection of this character should not be sustained unless the petition is so defective that a judgment thereon would be arrested because of its failure to state a cause of action.[2] If the defect is such that it would be cured by verdict, it must be taken advantage of by a demurrer in the regular way, or by a motion filed before the trial.[3] And the same rule obtains if the petition impliedly states a cause of action.[4] In a case where an objection to the introduction of evidence would be sustained, the court may dismiss the action of its own motion, even though defendant has filed an answer.[5]

§ 799. While the court is bound in a proper case to sustain an objection that the petition does not state facts sufficient to constitute a cause of action, even though not introduced until the plaintiff has entered upon his proof, yet courts do not look with favor on the practice of postponing such objection until that time. The fair way is to challenge the sufficiency of the petition by demurrer in the beginning, so that, if it is adjudged insufficient and is susceptible of amendment, the fault may be corrected at the threshold. If a party lies in wait for his adversary, the court should not allow him an advantage which he could not have obtained in the open field.[6] If sufficient facts can be gathered from the averments of the petition to make out a case, however imperfectly stated, such an objection is properly overruled.[7] And, in such case, every reasonable intendment will be indulged in favor of the petition.[8] Where plaintiff improperly pleads new matter in his reply, or pleads it in a defective manner, the defendant cannot wait until the trial and then on that ground object to the introduction of any evidence. He must meet the defect by a special demurrer, or better by a motion to strike out the part improperly pleaded.[9]

§ 800. **Same — A case illustrating the rule.** — In an action for damages based upon the failure of the defendant, a railroad

[1] Young v. Shickle Iron Co., 103 Mo. 324; Hatten v. Randall, 48 App. 203; Munford v. Keet, 65 App. 502; Todd v. Havlin, 72 App. 565.

[2] Donaldson v. Butler County, 98 Mo. 163.

[3] Marshall v. Ferguson, 78 App. 645; Jones v. Philadelphia Underwriters, 78 App. 296.

[4] Kansas City v. American Surety Co., 71 App. 315; Jones v. Philadelphia Underwriters, 78 App. 296; Marshall v. Ferguson, 78 App. 645.

[5] Staples v. Shackleford, 150 Mo. 471.

[6] Haseltine v. Smith, 154 Mo. 404.

[7] Delaney v. Bowman, 82 App. 252.

[8] Marshall v. Ferguson, 78 App. 645.

[9] Ricketts v. Hart, 73 App. 647.

company, to comply with certain ordinances of a city relating to speed, and requiring the bell of the locomotive to be rung, the petition set out with particularity the ordinance, the speed of the train, and the failure to ring the bell, and the fact that the deceased was run over and killed. It then concluded with the averment that, by reason of the facts aforesaid, plaintiff is damaged to the extent of $5,000. An objection was made to the introduction of evidence on the ground that the petition failed to state that the violation of the city ordinance was the cause of the accident, and that no attempt was made in the petition to connect the failure to observe the ordinance with the accident. It was held that this point would have been well taken if it had been raised by demurrer, but that it was not good when raised only by objection to the introduction of any evidence.[1]

**§ 801. Demurrer to the evidence.**— A demurrer to the evidence will not be sustained merely because the testimony offered does not support certain averments of the petition, if the evidence does support averments which are sufficient to authorize a recovery.[2] This subject, however, more properly belongs in a work on Practice.

**§ 802. Motion for judgment on the pleadings.**— A motion for judgment on the pleadings is in the nature of a demurrer, and raises only an issue of law.[3]

**§ 803. Considering the exhibits.**— Since an instrument filed with the pleadings as an exhibit does not constitute any part of the pleading and is not a part of the record,[4] such exhibit will not support the petition, either when attacked by a demurrer or by motion in arrest.[5] The sufficiency of the pleading must be determined by its contents, and it can be neither aided nor invalidated by the accompanying exhibit.[6] But this rule does not

[1] Lynch v. St. Joseph & Iowa R. Co., 111 Mo. 601. A similar ruling will be found in Foster v. Mo. Pac. R. Co., 115 Mo. 165.

[2] Gannon v. Laclede Gas Light Co., 145 Mo. 502.

[3] State ex rel. v. Simmons Hardware Co., 109 Mo. 118.

[4] Kearney v. Woodson, 4 Mo. 114; Hadwen v. Home Mut. Ins. Co., 13 Mo. 473; Hall v. Harrison, 21 Mo. 227; Chambers v. Carthel, 35 Mo. 374; Baker v. Berry, 37 Mo. 306; Bowling v. McFarland, 38 Mo. 465; Kerr v. South St. Louis Mutual Ins. Co., 40 Mo. 19; Peake v. Bell, 65 Mo. 224; Pomeroy v. Fullerton, 113 Mo. 440; Hickory County v. Fugate, 143 Mo. 71.

[5] Bowling v. McFarland, 38 Mo. 465; Emmert v. Meyer, 65 App. 609. The case of Case v. Fogg, 46 Mo. 44, while apparently holding a contrary view, is manifestly out of line with the otherwise unbroken course of decisions in this state.

[6] Merrill v. Central Trust Co., 46 App. 236.

apply to an account of items annexed to a pleading, which is a part of the record and a proper basis of evidence to sustain it.[1] And if the action is upon an account, and the account is set forth in conformity with the requirements of the statute, by being either embodied in the petition or attached to it, it forms a part of the record.[2]

§ 804. **Where part of a pleading is stricken out or adjudged bad.**— If an answer contains several defenses, one or more of which are adjudged insufficient on demurrer or motion to strike out, but those remaining are, if sustained, sufficient to defeat the action of plaintiff, defendant has the right to go to trial upon the remaining defenses, and a judgment by default cannot be rendered against him.[3] So, too, where defendant's answer contains a general denial and also a special defense, and plaintiff interposes a demurrer to the special defense which is overruled, it is not proper for the court to enter judgment in defendant's favor on the pleadings, if there is still matter left to be tried under the general issue. Thus, in an action brought against a telegraph company to recover damages for a mistake in transmitting a message, the defendant interposed a general denial, and also set up the defense that, by reason of the usual clause exempting the company from damages for mistakes unless the dispatch was repeated, the company was not liable. To this special defense plaintiff demurred, and the court overruled the demurrer. On the failure of plaintiff to plead further, the court entered a general judgment for defendant; but this was held to be erroneous because, while the special defense exonerated the company from the payment of damages, yet under the general issue plaintiff might still recover the amount paid by him for the transmission of the message.[4]

§ 805. **Where the attack is not followed up.**— If a demurrer is filed and no judgment is rendered on it, but the parties afterwards go to trial on an answer to the merits, the demurrer will be presumed to have been withdrawn.[5] So if a motion is made to strike out defendant's answer and, defendant not appearing upon the calling of the case, judgment is given for the plaintiff

[1] Coombs Commission Co. v. Block, 130 Mo. 668.

[2] Hassett v. Rust, 64 Mo. 325; Connor v. Heman, 44 App. 346.

[3] Munford v. Keet, 154 Mo. 36. See § 806, *post*.

[4] Jarboe v. Western Union Telegraph Co., 63 App. 226.

[5] Sweeny v. Willing, 6 Mo. 174; Dickey v. Malechi, 6 Mo. 177.

without any formal disposition of the motion, defendant is in no position to complain.[1]

**§ 806. Effect of pleading over or going to trial.**—If a motion to strike out part of a pleading is overruled, and the party filing the motion pleads over, he thereby waives his right to review the action of the court on such ruling, even though he saves his exceptions.[2] This rule applies where a motion to make a petition more definite and certain, or where a motion to strike out an amended petition because it changes the cause of action, has been overruled.[3] So where defendant moves to dismiss, and his motion is overruled, if he participates in the trial he waives his right to have the court's action reviewed.[4] If an answer is stricken out and defendant files a further answer, he abandons his right to review the court's action,[5] even though he excepts to the action of the court.[6] And if defendant answers over after the court has stricken out his plea in abatement in an attachment suit, he waives all objection to such action.[7] In like manner plaintiff, by filing a reply to that part of the answer which he had attacked by a motion to strike out, waives his right to have the court's action reviewed.[8]

[1] Webb v. Stevens, 14 Mo. 480.

[2] Coffman v. Walton, 50 App. 404; Williams v. Chicago, S. F. & Cal. R. Co., 112 Mo. 463; Liese v. Meyer, 143 Mo. 547.

[3] Sauter v. Leveridge, 103 Mo. 615; Lawless v. Lawless, 39 App. 539; Davis v. Boyce, 73 App. 563; Hansard v. Menderson, 73 App. 584.

[4] Cofer v. Riseling, 153 Mo. 633.

[5] Fuggle v. Hobbs, 42 Mo. 537.

[6] Gale v. Foss, 47 Mo. 276.

[7] McDonald v. Fist, 60 Mo. 172.

[8] Springfield E. & T. Co. v. Donovan, 147 Mo. 622.

# CHAPTER XXXII.

## THE DEMURRER.


§ 807. The statute.
808. The statute applied.
809. Demurrer in equity causes.
810. Demurrer to answer.
811. Demurrer to exhibits.
812. Who may demur.
813. Where there are several defendants.
814. General demurrer.
815. Special demurrer.
816. What a general demurrer reaches.
817. Capacity of plaintiff to sue.
818. What demurrer admits.
819. Does not admit conclusion of law.
820. Same — Rule in equity.
821. Same — Illustrative cases.
822. Admission applies only to case at bar.
823. But is effective in appellate court.
824. Assessing the damages.
825. The demurrer must specify the grounds.
826. What objections may be raised by demurrer.
§ 827. Decisions applying the rule.
828. Demurrer to prayer for relief.
829. What objections may be raised — Misjoinder of causes in one count.
832. Same — Statute of limitations.
833. What objections must be raised by demurrer.
834. Same — Misjoinder or non-joinder of parties.
835. Same — Misjoinder of causes.
836. Same — Misjoinder of parties and of causes.
837. No cause of action stated.
838. Same — Cases applying the rule.
839. Same — Relief.
840. Time of filing demurrer.
841. Action on demurrer.
842. Sufficiency of prior pleading.
843. Demurrer not acted on.
844. Effect of sustaining the demurrer.
845. Same — Third pleading.
846. Effect of overruling the demurrer.
847. Effect of answering over.


§ 807. **The statute.**— The defendant may demur to the petition whenever it appears upon the face thereof, either, *first*, that the court has no jurisdiction of the person of the defendant or of the subject of the action; or, *second*, that plaintiff has no legal capacity to sue; or, *third*, that there is another action pending in this state between the same parties and for the same cause; or, *fourth*, that there is a defect of parties, plaintiff or defendant; or, *fifth*, that several causes of action have been improperly united; or, *sixth*, that the petition does not state facts sufficient to constitute a cause of action; or, *seventh*, that a party, plaintiff or defendant, is not a necessary party to a complete determina-

tion of the action.[1] The demurrer must distinctly specify the grounds of objection to the pleading, and unless it does so it may be disregarded.[2] The defendant may demur to the whole petition, or to any one or more of the alleged causes of action stated therein, and may answer to the residue.[3] Plaintiff may demur to one or more defenses set up in the answer, stating in his demurrer the grounds thereof.[4] And defendant may demur to the reply. A demurrer to the answer or to the reply is governed by the rules prescribed in relation to demurrers to petitions where they apply.[5]

§ 808. **The statute applied.**— The defendant may demur to the whole petition, or to any one or more of the alleged causes of action stated in it, and answer the residue.[6] He may demur to one part of a petition and answer to another; but he cannot do both at the same time and in the same pleading.[7] He cannot demur and answer to the same subject-matter.[8] By raising the issues of fact he waives those of law. Therefore a defendant cannot at the same time answer plaintiff's petition and demur to it for a misjoinder of parties.[9] But if plaintiff files a general denial by way of reply, and at the same time demurs to a special defense in the answer, this will be deemed a withdrawal of the reply to that defense.[10]

§ 809. **Demurrer in equity causes.**— The office of a demurrer, when interposed to a bill in equity, is to reach a determination whether the allegations of the bill show a proper case for equitable interference.[11] If the petition is framed with a view to equitable relief, and the facts set out do not warrant such relief, a demurrer will lie; as where the petition seeks for an account, and an injunction and the appointment of a receiver, as though a partnership existed between the parties, but sets out a contract which shows that there is no partnership.[12] An executor sought to enforce against the residuary legatee a vendor's lien in favor of the testator. The legatee pleaded in defense that all debts provable against the estate, as well as all bequests and charges

[1] Rev. Stat. 1899, sec. 598.
[2] Rev. Stat. 1899, sec. 599.
[3] Rev. Stat. 1899, sec. 600.
[4] Rev. Stat. 1899, sec. 607.
[5] Rev. Stat. 1899, sec. 609.
[6] Rev. Stat. 1899, sec. 600.
[7] Taber v. Wilson, 34 App. 89.
[8] Long v. Towl, 41 Mo. 398.
[9] Donahue v. Bragg, 49 App. 273.
[10] Henley v. Henley, 93 Mo. 95. This is placed on the ground that the reply, being general, must be regarded as relating alone to that part of the answer not embraced in the special defense.
[11] Roberts v. Bartlett, 26 App. 611, 615; Fisher v. Patton, 134 Mo. 32.
[12] Mulholland v. Rapp, 50 Mo. 42.

payable out of the estate other than the residuary bequest to himself, had been satisfied, but it also appeared from his answer that the time allowed by statute for the presentation of claims against the estate had not elapsed. A demurrer to this defense was properly sustained, by reason of the fact that the allegation in the answer that there were no provable demands against the estate was not susceptible of absolute proof, and the answer did not tender a refunding bond. The trial court might, however, in such a case stay the execution upon the giving of such a bond, if the proof satisfied the court that the allegation was true.[1]

§ 810. **Demurrer to answer.**— If the answer sets up a good defense, it is not demurrable because it contains matter of surplusage.[2] If a demurrer goes to the whole answer, and any matter pleaded in the answer tenders any defense in whole or in part, the demurrer must be overruled.[3] If the answer consists of a general denial and special defenses, and the special defenses do not in terms admit facts sufficient to entitle the plaintiff to judgment, a demurrer to the whole answer will not lie; the proper method of testing the sufficiency of the special pleas is to demur to them only, or to move to strike them out.[4] Whether the defense pleaded is a bar to the whole action or only *pro tanto* is a matter of law for the court; but if it is good as a defense to a part of the cause of action, it is not demurrable.[5] An answer which neither denies nor confesses and avoids the statements of the petition is demurrable.[6] The demurrer is sufficient if it states that the facts set out in the answer constitute no defense to the action.[7]

§ 811. **Demurrer to exhibits.**— An instrument, which is by section 643[8] required to be filed with the pleading, cannot be made the subject of demurrer,[9] although the failure to file the instrument may be a ground of demurrer.[10]

§ 812. **Who may demur.**— Where there is a misjoinder of causes of action, any defendant may demur; but in case there is a joinder of improper parties as defendants, the defendant improperly joined can alone demur.[11] If in such case there is a joint

[1] Powell v. Palmer, 45 App. 236.

[2] Isaacs v. Skrainka, 13 App. 593.

[3] Justice v. Lancaster, 20 App. 559.

[4] State ex rel. v. Rogers, 79 Mo. 288.

[5] Kerr v. Simmons, 82 Mo. 269.

[6] St. Louis Gas Light Co. v. St. Louis, 11 App. 55.

[7] German Bank v. Mulhall, 8 App. 558.

For demurrer to answer in equity, see the preceding section.

[8] Rev. Stat. 1899.

[9] Hall v. Harrison, 21 Mo. 227; Curry v. Lackey, 35 Mo. 389; Hickory County v. Fugate, 143 Mo. 71.

[10] Hook v. Murdoch, 38 Mo. 224.

[11] Ashby v. Winston, 26 Mo. 210; Alnutt v. Leper, 48 Mo. 319.

demurrer filed by all the defendants, it should be overruled as to those who are properly made parties;[1] the joint demurrer cannot be sustained.[2] A defendant who is not a necessary party to the suit must take advantage of the defect by demurrer, since if he goes to trial he cannot then ask to have his name stricken out.[3] In a will contest, if neither the executor nor the devisees are made parties, the executor may enter his appearance, be made a party defendant, and may then demur for non-joinder of the devisees.[4]

**§ 813. Where there are several defendants.**— It is the better practice where there are several defendants, and all of them desire to demur, that each should file a separate demurrer. But it is not essential that this course should be followed. Thus, where a bill in equity was filed against an administrator and five other parties, and all of the defendants filed a joint demurrer on the ground that no cause of action was stated against any of them, and also on the ground that one of the defendants named was not a necessary or proper party, the trial court sustained the demurrer. The appellate court, however, held that a good cause of action was stated against the administrator, but that no cause of action was stated as against the other parties, and that the other parties were not necessary nor proper parties; that while, for this reason, the court below erred in sustaining the demurrer as to all the defendants, yet it might perhaps have been sustained as to all the defendants except the administrator, and overruled as to him. But the court observes that the proper method would have been for each defendant to have filed his own demurrer.[5]

**§ 814. General demurrer.**— The demurrer must distinctly specify the grounds of objection to the pleading, and unless it does so it may be disregarded.[6] A defendant may demur to the whole petition, or he may demur to any one or more of the causes of action stated therein, and answer the residue.[7] And under section 609[8] plaintiff may demur to the whole answer, or to any one or more of the defenses stated in it, and reply to the residue. In view of these provisions it is clear that, speaking strictly, there is no longer such a thing in this state as a general demurrer; but a

[1] Ancell v. Cape Girardeau, 48 Mo. 80; Alnutt v. Leper, 48 Mo. 319; Brown v. Woods, 48 Mo. 330.

[2] Bank of Missouri v. Young, 35 Mo. 371.

[3] Soeding v. Bartlett, 35 Mo. 90.

[4] Eddie v. Parke, 31 Mo. 513.

[5] Swan v. Thompson, 36 App. 155, 159.

[6] Rev. Stat. 1899, sec. 599.

[7] Rev. Stat. 1899, sec. 600.

[8] Rev. Stat. 1899.

demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action, which is the form prevailing in this state when that is the ground of demurrer, is practically the same as a general demurrer at common law.[1] Still, if the petition does state a cause of action, objections which go to some minor and not necessarily fatal imperfection must be specifically stated.[2] And if the demurrer sets forth as one ground of objection that the petition does not state sufficient facts, and also contains other specific objections to the petition, defendant will not be restricted to the latter, unless the demurrer itself in express terms so limits him.[3]

§ 815. **Special demurrer.**— The practice act has abolished the old special demurrer to mere matters of form.[4]

§ 816. **What a general demurrer reaches.**— Where the petition by fair and reasonable intendment impliedly states a cause of action, a general demurrer to it will not reach a defective or uncertain allegation.[5] If the petition shows by implication a contract between the plaintiff and defendant, and a right of recovery thereon in the plaintiff, a general demurrer will not lie.[6] Where in an attachment suit plaintiff files a motion to strike out a separate plea in abatement filed by one of the defendants, such motion, which is in the nature of a demurrer to the plea, must be directed against that which is objectionable in the plea and no more; if it is general, and the plea as a whole is good, it must be overruled.[7]

§ 817. **Capacity of plaintiff to sue.**— Where the title of a foreign corporation, and of the plaintiff as its receiver, is fully and explicitly set forth in the petition, if defendant intends to question the right of the corporation to maintain an action in this state, or the right of its receiver to do so, it must be done by a special demurrer.[8] In a suit brought by an infant, the failure of the petition to allege the appointment of a guardian or next friend to prosecute the suit constitutes an objection which goes

[1] See Stephen, Plead. (3d Am. ed.), p. 82. It may have been the intention of the framers of the Code that the particulars in which the petition fails to state a cause of action should be pointed out in the demurrer; but such is not the general practice in this state. See Darby v. Cabanne, 1 App. 126; Wilson v. Polk County, 112 Mo. 126.

[2] Morgan v. Bouse, 53 Mo. 219, 221.

[3] See Wilson v. Polk County, 112 Mo. 126.

[4] Bauer v. Wagner, 39 Mo. 385.

[5] State ex rel. v. Edmundson, 71 App. 172.

[6] Hallock v. Brier, 80 App. 331.

[7] Mo. Glass Co. v. Copeland Sewing Machine Co., 88 Mo. 57.

[8] Clark v. Lopp, 80 App. 542.

merely to the legal capacity of the plaintiff to sue, and, if no objection is taken to it before the trial, it is such an imperfection as is cured by the statute of jeofails.[1]

**§ 818. What demurrer admits.**— The theory of a demurrer is that, although it be granted that all the material facts properly alleged in the petition are true, yet plaintiff is not entitled to recover. It logically follows that for the purposes of the demurrer all the material facts which are well and properly pleaded in the petition must be taken as true. And such is the uniform ruling both at common law and under the Code.[2] A demurrer to the petition admits all the material facts alleged.[3] And the party demurring cannot afterwards claim that the facts stated in the petition are improbable.[4] A demurrer to a plea of the statute of limitations admits that the cause of action did not accrue within the time alleged in the petition.[5] If the pleading is so uncertain that no intelligent judgment can be rendered on it when admitted, the admission amounts to nothing.[6]

**§ 819. Does not admit conclusion of law.**— While it is true that a demurrer confesses the facts which are well pleaded in the pleading against which it is directed, yet it does not confess a conclusion of law drawn from those facts; nor does a demurrer to the petition admit the plaintiff's understanding of the contract sued on.[7] And even statements made as of fact, which are designed to show the invalidity of a statute, are not to be taken as true like other statements in a case. A public law cannot be thus confessed away.[8] Since neither an averment of matter of law is admitted by the demurrer,[9] nor a mere conclusion of law,[10] the statement in a pleading that the conveyance was fraudulent is not the statement of a fact, and is not admitted by a demurrer.[11]

**§ 820. Same — The rule in equity.**— While it is true, as above stated, that in an action at law the demurrer admits only the facts, but does not admit the conclusions of law which the pleader draws from those facts, yet it seems that in an equitable cause the demurrer not only confesses the facts pleaded in the petition,

[1] Lyddon v. Dose, 81 App. 64.

[2] Goodson v. Goodson, 140 Mo. 206; Shields v. Johnson County, 144 Mo. 76.

[3] Dodson v. Lomax, 113 Mo. 555; Verdin v. St. Louis, 131 Mo. 26.

[4] Plant Seed Co. v. Michel Plant & Seed Co., 23 App. 579.

[5] State to use v. Finn, 19 App. 560.

[6] State ex rel. v. Everett, 52 Mo. 89.

[7] Blaine v. Geo. Knapp & Co., 140 Mo. 241; State ex rel. v. Aloe, 152 Mo. 466; Knapp v. St. Louis, 153 Mo. 560; Same Case, 156 Mo. 343.

[8] State ex rel. v. Aloe, 152 Mo. 466.

[9] Bradley v. Franklin County, 65 Mo. 638.

[10] Kleekamp v. Meyer, 5 App. 444.

[11] Dannan v. Coleman, 8 App. 595.

but also the equities that arise from the facts as such equities are stated in the petition.[1]

§ 821. **Same — Illustrative cases.**— In an action on the bond of a county collector for money alleged to have been collected by him as state revenue and for the state interest fund, the petition charged that in 1891 and 1892 the taxes were levied against two railroads named in the petition, that the taxes were properly entered upon the tax-books for those years, that the tax-books were delivered to the collector, that the taxes were thereafter collected by him, and that he had failed to pay them into the state treasury. A demurrer having been interposed to the petition, it was held that by demurring the defendants admitted all the above allegations to be true and, therefore, they were in no position to deny that the railroad companies were the owners of the property with which they were assessed.[2] A demurrer to the petition in an action of libel confesses the malice and falsity of the charge, and also that the meaning supplied by the *innuendo* is the true meaning of the words charged to be libelous.[3] If, in a suit to enjoin the infringement of a trade-mark, the petion alleges that by reason of the acts of defendant complained of persons were misled, it cannot be argued that persons would not be likely to be misled by the acts specified, since the demurrer admits that they were so misled.[4]

§ 822. **Admission applies only to case at bar.**— While a demurrer admits matters that are well pleaded,[5] yet such admission is only for the purpose of deciding the questions which are raised by the demurrer. The statements in the petition demurred to are not evidence on the question of damages or on the general issue.[6]

§ 823. **But is effective in appellate court.**— Where defendant stands on his demurrer when it is overruled, and appeals on the judgment, he is as much bound in the appellate court by the admissions of the demurrer as he was in the trial court.[7]

§ 824. **Assessing the damages.**— Where judgment is rendered for plaintiff upon defendant's demurrer, plaintiff's cause of action is admitted as stated in his pleading, and the only matter for the jury on an inquiry is to ascertain the amount of damages.[8] But

[1] Williams v. Gerber, 75 App. 18.
[2] State ex rel. v. Seibert, 148 Mo. 408.
[3] McGinnis v. Knapp, 109 Mo. 131.
[4] Plant Seed Co. v. Michel Plant & Seed Co., 23 App. 579.
[5] Warder v. Evans, 2 Mo. 205; McKinzie v. Mathews, 59 Mo. 99.
[6] McKinzie v. Mathews, 59 Mo. 99.
[7] Wolff v. Ward, 104 Mo. 127.
[8] Steamboat Reveille v. Case, 9 Mo.

if the amount of damages is liquidated or is fixed by the statute, there is nothing left but for the court to enter the proper judgment.[1]

**§ 825. The demurrer must specify the grounds.**—The statute provides that the demurrer must distinctly specify the grounds of objection to the pleadings, and that unless it does so it may be disregarded.[2] The word "may," in this section, means "should,"[3] and if the demurrer does not set forth the grounds upon which it is based, neither the trial court nor the appellate court will take notice of defects not specified.[4] If the trial court sustains the demurrer for reasons not set forth in it, the judgment will be reversed by the appellate court.[5] If the petition fails to state a cause of action, a demurrer assigning this ground in the language of the statute is sufficient.[6] But if the petition does state a cause of action, any objections which go to some minor imperfections, which are not necessarily fatal, must be specifically stated in the demurrer.[7] If the demurrer is based upon the ground that the petition does not state a cause of action, and it also sets forth other specific objections to the petition, the defendant will not be restricted to the specific objections, unless he is so limited by the very terms of the demurrer itself.[8] A demurrer to an answer on the ground that the facts set out in it constitute no defense to the action is sufficient.[9]

**§ 826. What objections may be raised by demurrer.**—That a demurrer may lie, the defect must appear upon the face of the pleading. Therefore, where a demurrer is based upon the ground that another action is pending between the same parties for the same cause of action, and no such facts appear in the petition, it will be overruled.[10] Under the code practice there are only two things which are fatal to a suit. The first is that the petition does not state facts sufficient to constitute a cause of action; the

502; Scott v. Mo. Pac. R. Co., 38 App. 523.

[1] Scott v. Mo. Pac. R. Co., 38 App. 523. See § 822, *ante*.

[2] Rev. Stat. 1899, sec. 599.

[3] McClurg v. Phillips, 49 Mo. 315; Roberts v. Bartlett, 26 App. 611.

[4] Jamison v. Copher, 35 Mo. 483; Alnutt v. Leper, 48 Mo. 319; Brumley v. Golden, 27 App. 160; Hickory County v. Fugate, 143 Mo. 71.

[5] Cheely v. Wells, 33 Mo. 106.

[6] Morgan v. Bouse, 53 Mo. 219; Darby v. Cabanne, 1 App. 126; Wilson v. Polk County, 112 Mo. 126.

[7] Morgan v. Bouse, 53 Mo. 219.

[8] Wilson v. Polk County, 112 Mo. 126.

[9] German Bank v. Mulhall, 8 App. 558.

[10] Arthur v. Rickards, 48 Mo. 298.

second, that the court has no jurisdiction over the subject-matter of the suit.[1] If, where an action is founded on an account, the petition does not contain the account, and it is not annexed to the petition, a demurrer will lie.[2] A demurrer will lie to an interplea;[3] but the objection that an interplea is not verified cannot be taken by demurrer, though the defect may be reached by a motion to strike out.[4]

§ 827. **Decisions applying the rule.**— The fact that an amended petition sets forth a different cause of action from that declared on in the original petition cannot be reached by demurrer.[5] Where a minor sues by his father, his natural guardian, for the purpose of having a new trustee appointed, and it does not appear from the petition that the father has given bond as guardian, a demurrer on that ground will not lie.[6] Where upon a statutory arbitration an award has been made, and a motion is filed in the circuit court for a judgment on the award, the party against whom the award is made has the right to object to the sufficiency of the motion by a writing in the nature of a demurrer; and if his objection is not well taken, judgment will be entered on the award.[7] In an action for a breach of contract, if the petition in terms alleges that the contract was made by the defendant with an agent of the first-mortgage bond-holders of the plaintiff, it does not appear that the plaintiff has any interest in the cause of action, and a demurrer to the petition is properly sustained.[8] If a bill, filed for a specific performance of a contract for the sale of land, shows upon its face that the contract is within the statute of frauds, defendant may raise the point by demurrer.[9]

§ 828. **Demurrer to prayer for relief.**— A demurrer does not lie to the prayer for relief.[10] Nor will it lie because the relief prayed is beyond the power of the court to grant, or because the relief prayed for is not proper upon the facts pleaded. Whatever the prayer may be, the court will look to the whole petition and grant such relief as the facts pleaded will authorize.[11]

[1] Elfrank v. Seiler, 54 Mo. 134.
[2] Graves v. Pierce, 53 Mo. 423.
[3] Chase v. Alexander, 6 App. 505.
[4] Scott-Force Hat Co. v. Hombs, 127 Mo. 392.
[5] Daudt v. Machens, 13 App. 592.
[6] Temple v. Price, 24 Mo. 288.
[7] Shores v. Bowen, 44 Mo. 396.
[8] Carondelet Gas Light Co. v. Pratt, 7 App. 573.
[9] Chambers v. Lecompte, 9 Mo. 575.
[10] Saline County v. Sappington, 64 Mo. 72.
[11] Liese v. Meyer, 143 Mo. 547. See also § 839, *post;* and consult also ch. XIV.

**§ 829. What objections may be raised — Misjoinder of causes in one count.**— The fifth subdivision of section 598,[1] specifying as one cause of demurrer that several causes of action have been improperly united, does not apply to the manner of joinder, that is to the improper commingling in one count of matters which might be properly united in a petition by different counts, but to the substantive error of uniting, whether in one count or several, matters which cannot be united at all.[2] The former error should be reached by motion to elect or to strike out; the latter defect should be reached by demurrer, if the defect appears upon the face of the petition.[3] In the cases cited no mention is made of the earlier cases of *Elderlin v. Judge*[4] and *Clark v. Hannibal & St. J. R. Co.*,[5] where it is held that the defect that several causes of action are joined in the same count may be taken advantage of by demurrer. But these cases can no longer be held to be authoritative, though there is an intimation to a like effect in *Mitchner v. Holmes*.[6] Nor is the more recent case of *Thompson v. School District*[7] referred to in the cases cited above. But it is to be noted that in that case plaintiff not only united in one count two separate causes of action but different causes of action against two separate defendants. It is true that the decision is cited as an authority, and apparently on the point, in a recent case before the court of appeals, where it is held that a demurrer is the only proper mode of raising the objection that two causes of action of the same class are blended in one count.[8] But it must be considered that the weight of authority is adverse to this view. In fact, in one of the earlier cases mentioned above,[9] the court probably only intended to decide, what is well stated in *Brown v. Kansas City, St. J. & C. B. R. Co.*,[10] that what constitutes an improper and demurrable union in one count of causes of action is the union of incongruous causes of action which cannot be united in the same petition. A demurrer is the proper method of raising

[1] Rev. Stat. 1899.

[2] Mulholland v. Rapp, 50 Mo. 42; Fadley v. Smith, 23 App. 87; Wilson v. St. Louis & S. F. R. Co., 67 App. 443; State ex rel. v. Tittmann, 103 Mo. 553; Ferguson v. Davidson, 65 App. 193.

[3] Otis v. Mechanics' Bank, 35 Mo. 128; Mulholland v. Rapp, 50 Mo. 42; Christal v. Craig, 80 Mo. 367; State ex rel. v. Tittmann, 103 Mo. 553.

[4] 36 Mo. 350.

[5] 36 Mo. 202.

[6] 117 Mo. 185.

[7] 71 Mo. 495.

[8] Sinclair v. Mo., K. & T. R. Co., 70 App. 588.

[9] Ederlin v. Judge, 36 Mo. 350.

[10] 20 App. 427.

that question. In a later decision of the court of appeals it is said that demurrer is the proper method of raising the question of improper joinder in the same count of causes which cannot be joined in the same petition, but which are of such a nature that objection must be made before the trial.[1] So that it may be considered as settled that the question of whether or not a demurrer will lie, depends, not so much upon whether the different causes of action are stated in one count or several counts, but whether the different causes stated are such as do not belong in the same one of the different classes specified in section 598. Under the rules above stated it is evident that a demurrer will not lie to a petition in an action to enforce the payment of delinquent taxes on the ground that the petition unites in one count the taxes for several years.[2]

§ 830. Where two causes of action are combined in one count, and some of the defendants are liable on one cause of action but not on both, the defect may be reached by demurrer or by motion in arrest, since one ground of demurrer is that a party, plaintiff or defendant, is not a necessary party to a complete determination of the action. But where a cause of action on a note is joined in the same count with a cause of action for money alone which was the consideration of the note, a demurrer will not lie; the defect must be reached by a motion to strike out.[3]

§ 831. Where there is an agreement to pay a given sum of money, and, in case it becomes necessary to sue for the amount by reason of failure to pay the same on maturity, to pay a reasonable attorney's fee in addition, there is but one contract with two stipulations, and a demurrer will not lie because the petition contains but one count. Had plaintiff brought his action on one stipulation, omitting the other, he might have barred himself from a subsequent action on the remaining stipulation.[4]

§ 832. **What objections may be raised — Statute of limitations.** — Both at common law and under the Code the defense of the statute of limitations must be raised by answer, except in those cases where the statute confers title, in which case it becomes available under the general issue or general denial,[5] as in

[1] Fadley v. Smith, 23 App. 87.

[2] State ex rel. v. Tittmann, 103 Mo. 553.

[3] Farmers' Bank v. Bayliss, 41 Mo. 274. The principle is also recognized in Thompson v. School District, 71 Mo. 495.

[4] Comstock v. Davis, 51 Mo. 569. See also §§ 835, 836.

[5] Benoist v. Darby, 12 Mo. 196; Bell v. Clark, 30 App. 224; Orr v. Rode, 101 Mo. 387; Stoddard County v. Malone, 115 Mo. 508; Maddox v. Duncan, 62 App. 474.

actions of ejectment.[1] Defendant must set up the defense and make it at the trial; he cannot raise the question for the first time in the supreme court.[2] It cannot ordinarily be taken advantage of by demurrer;[3] though if all the necessary facts appear upon the face of the petition, the defense may be made by demurrer,[4] as in cases in which the statute creates a bar without any exception.[5] But the defense can be raised by demurrer only where it clearly appears that plaintiff's case has been fully stated, and that being so stated no recovery can be had.[6] In an action to vacate a judgment on the ground that it was fraudulently obtained, and to divest defendants of their title acquired under the judgment, it appeared upon the face of the petition that more than twenty years had elapsed since the right of action had accrued, and no reason was alleged why the action was not commenced within the twenty years. A demurrer to this petition was sustained.[7] In order to avail himself of the bar of the statute when the facts appear upon the face of the petition, the defendant must demur specially; a general demurrer will not do.[8]

**§ 833. What objections must be raised by demurrer.**— If defects which are by the statute made grounds for demurrer[9] appear upon the face of the petition, they cannot be taken advantage of by answer.[10] But this rule does not apply to a failure to state a cause of action, nor to the objection that the court has no jurisdiction over the subject-matter.[11] If the defendant does not demur, but confesses and avoids, thereby pleading as though the petition presented proper issues, he waives the objection that the petition does not sufficiently aver the constitutive facts.[12] If the answer attempts to set up the defense of accord and satisfaction,

[1] Nelson v. Brodhack, 44 Mo. 596; Fulkerson v. Mitchell, 82 Mo. 13; Holmes v. Kring, 93 Mo. 452; Stocker v. Green, 94 Mo. 280; Fairbanks v. Long, 91 Mo. 628; Campbell v. Laclede Gas Light Co., 84 Mo. 352.

[2] Wynn v. Cory, 48 Mo. 346.

[3] Smith v. Dean, 19 Mo. 63.

[4] State to use v. Bird, 22 Mo. 470.

[5] State to use v. Bird, 22 Mo. 470; Maddox v. Duncan, 62 App. 474; Henoch v. Chaney, 61 Mo. 129.

[6] McNair v. Lott, 25 Mo. 182; Boyce v. Christy, 47 Mo. 70.

[7] Heffernan v. Howell, 90 Mo. 344.

[8] State ex rel. v. Spencer, 79 Mo. 314.

[9] Rev. Stat. 1899, sec. 598.

[10] Bender v. Zimmerman, 135 Mo. 53.

[11] Nicholson v. Golden, 27 App. 132; Ryors v. Pryor, 31 App. 555; Heman v. Glann, 129 Mo. 325.

[12] Banchor v. Gregory, 9 App. 102. This is a case where the answer supplied the averments which plaintiff failed to make in his petition. See § 881, *post.*

but fails to aver that the thing assigned was accepted by plaintiff in full satisfaction, yet if plaintiff, instead of demurring, files a reply and goes to trial on the issue, he cannot afterwards object to the answer.[1] An objection that an action on a special tax-bill should have been brought in the name of the city to the use of the plaintiff, instead of directly by the plaintiff, is one which appears upon the face of the petition and is waived if not raised by demurrer.[2] So, too, the objection that a foreign executor or administrator has no capacity to sue must be raised by a special demurrer, if it is apparent upon the face of the petition; if not so raised, the objection is waived.[3] Where, upon the removal of an assignee, an action is brought by his successor upon his official bond, and defendants desire to object upon the ground that the creditors, and not the assignee, are the proper parties to sue, they must make the objection by demurrer; otherwise they waive it.[4] The objection that the plaintiff has an adequate remedy at law must be made by demurrer.[5]

§ 834. **Same — Misjoinder or non-joinder of parties.**—Where it is apparent upon the face of the petition that there is a misjoinder of parties plaintiff, the objection must be made by demurrer;[6] but if defendant answers over, he cannot subsequently withdraw his answer and demur on that ground. Nor can the court by reserving such question on the demurrer suspend the operation of the statute.[7] And if in such case the defendant's objection to the misjoinder is blended with matter pleadable only by answer, the objection of a misjoinder is not properly raised, and will be treated as waived.[8] The above rule applies to the objection that the petition is defective by reason of a non-joinder of parties;[9] or that some of the plaintiffs are improperly made parties;[10] or that one is improperly joined as a defendant.[11] And the rule applies to an interplea[12] and to a counter-claim.[13]

§ 835. **Same — Misjoinder of causes.**— The objection that several causes of action have been improperly united in one pe-

[1] Oil Well Supply Co. v. Wolfe, 127 Mo. 616.

[2] Galbreath v. Newton, 45 App. 312.

[3] Gregory v. McCormick, 120 Mo. 657.

[4] State to use v. Hunt, 46 App. 616.

[5] Block v. Chase, 15 Mo. 344.

[6] Dodson v. Lomax, 113 Mo. 555.

[7] Finney v. Randolph, 68 App. 557. The statute referred to is Rev. Stat. 1899, sec. 602.

[8] Taber v. Wilson, 34 App. 89.

[9] Kerr v. Bell, 44 Mo. 120.

[10] Russell v. Defrance, 39 Mo. 506.

[11] Boland v. Ross, 120 Mo. 208.

[12] Scott-Force Hat Co. v. Hombs, 127 Mo. 392.

[13] Winton State Bank v. Harris, 54 App. 156.

tition must be raised by demurrer or it will be waived; it cannot be taken advantage of by motion in arrest.[1]

**§ 836. Same — Misjoinder of parties and of causes of action.** An objection that there is both a misjoinder of parties and of causes of action must be made either by demurrer or answer.[2] Where the action is by a husband and wife, and the petition alleges that defendant engaged plaintiffs to take care of his invalid son, it states a cause of action, and a demurrer will not lie on the ground of misjoinder of the wife, although the services performed by the wife were such that, under the common law, the compensation for them would have belonged to the husband.[3]

**§ 837. No cause of action stated.**— Under the sixth subdivision of section 598,[4] the cause of demurrer is that the petition does not state facts sufficient to constitute a cause of action.[5] The test of the sufficiency of a petition on general demurrer is whether the facts therein stated, if true, show a cause of action against the demurring defendant.[6] To sustain a demurrer on this sixth ground, the statement of facts must be such that, admitting them all to be true, the court is warranted in saying that they furnish no cause of action against the defendant.[7] The demurrer will not be sustained merely because the petition is badly and inartistically drawn, unless it is so wholly wanting in necessary averments that it entirely fails to state a cause of action.[8] If it defectively states a cause of action, it is good on general demurrer.[9] It is only where it is so wholly wanting in necessary averments that it fails to state any cause of action whatever that a demurrer will lie.[10] But a demurrer will lie if it is impossible to determine from the allegations of the petition whether or not the plaintiff has a cause of action.[11]

[1] Union Bank v. Dillon, 75 Mo. 380; Baker v. Raley, 18 App. 562; Blair v. Chicago & Alton R. Co., 89 Mo. 383.

[2] Rothschild v. Lynch, 76 App. 339; Thompson v. School District, 71 Mo. 495.

[3] Neimeyer v. Neimeyer, 70 App. 609.

[4] Rev. Stat. 1899.

[5] As section 609 provides that demurrers to the answer or reply shall be governed by the rules prescribed in relation to demurrers to petitions, a demurrer will lie to new matter in the answer or reply if the averments do not set forth facts sufficient to constitute a defense to the pleading which they are designed to meet. Howell v. Stewart, 54 Mo. 400.

[6] Wetmore v. Crouch, 55 App. 441; State ex rel. v. Pohlman, 60 App. 444; Ferguson v. Davidson, 65 App. 193.

[7] Darby v. Cabanne, 1 App. 126.

[8] State ex rel. v. Carroll, 63 Mo. 156; Ferguson v. Davidson, 65 App. 193.

[9] Aurora Water Co. v. Aurora, 129 Mo. 540.

[10] Verdin v. St. Louis, 131 Mo. 26.

[11] Embree v. Patrick, 72 Mo. 173. See § 841, *post*.

§ 838. **Same — Cases applying the rule.**— Where it appears from the allegations of the petition itself that all the material issues of fact tendered for trial are the same as those tendered, joined and adjudicated in a former case between the same parties, it fails to state an existing cause of action, and is for that reason demurrable.[1] In a suit for partition, if the petition fails to set forth the ownership of each several interest in the land sought to be divided, and contains no averment that the owner of any portion was unknown, or that there was any difficulty in pointing out the owner and defining his interest, it is demurrable.[2]

§ 839. **No cause of action stated — Relief.**— A demurrer will not lie on the ground that the petition does not state a cause of action, notwithstanding the fact that the relief prayed for cannot be granted, if the facts alleged authorize the granting of any relief, since the court is not confined to the prayer in granting relief, but may look to the whole petition, and grant any relief consistent with the case made by the evidence and embraced within the issues.[3] But if the petition is framed with a view to equitable relief, and the facts set forth do not warrant such relief, a demurrer will lie; as, for instance, where the petition seeks for an account, an injunction, and the appointment of a receiver, as though a partnership existed between the parties, and at the same time sets out a contract, which shows that there is no partnership.[4]

§ 840. **Time of filing demurrer.**— If the demurrer is not filed until the trial has begun and while it is pending, it is properly stricken out.[5]

§ 841. **Action on demurrer.**— In case a petition is good in part, a general demurrer should be overruled, unless the good part is so intermingled with the bad as to vitiate the whole. Thus, in an action to recover for false representations made by defendant as to the credit of another, if the petition charges both oral and written representations to have been made by the defendant, a general demurrer to the petition cannot be sustained, if a good cause of action is stated based upon the written assurance.[6] If the petition contains several counts, and a demurrer is interposed to the petition as a whole, if either count of the petition states a

[1] Givens v. Thompson, 110 Mo. 432.

[2] Rogers v. Miller, 48 Mo. 378.

[3] Northcroft v. Martin, 28 Mo. 469; Easley v. Perrill, 37 Mo. 361; Crosby v. Farmers' Bank, 107 Mo. 436.

[4] Mulholland v. Rapp, 50 Mo. 42. That a demurrer does not lie to the prayer, see § 828, *ante*.

In this connection, consult chapter XIV.

[5] Fadley v. Smith, 23 App. 87.

[6] Clark v. Edgar, 84 Mo. 106.

good cause of action the demurrer must be overruled.[1] In determining the demurrer the trial court will not look at the exhibits, unless they are made a part of the pleading by being inserted therein;[2] nor will it look beyond the demurrer for reasons why it should be sustained.[3] But if the contract sued on is in writing, and is fully set out in the petition, it will then be considered in connection with the other averments in the petition in passing upon its sufficiency.[4]

**§ 842. Sufficiency of prior pleading.**— The rule of the common law that a demurrer to any subsequent pleading brings up the sufficiency of the pleadings which have preceded the demurrer, and that judgment must be given against the party who committed the first error,[5] is also the rule under the Code, since it is not a technical one, but necessarily incidental to every system, and one which may be successfully invoked whenever the court is advised by demurrer or motion of any substantial error or defect in a pleading, such as would render a verdict nugatory if founded upon it.[6] And the rule applies to a motion to strike out, as well as to a demurrer.[7]

**§ 843. Demurrer not acted on.**— Where a demurrer has been filed and no judgment is rendered thereon, but the parties afterward go to trial on the merits, it will be presumed that the demurrer was withdrawn.[8] So, too, if the demurrer is filed and is not disposed of, and defendant afterwards files an answer, and the case is tried, this amounts to a waiver of the demurrer.[9]

**§ 844. Effect of sustaining the demurrer.**— If the demurrer is sustained, and the plaintiff does not see fit to amend his petition, it is necessary that judgment should be rendered in favor of the defendant before the plaintiff can pursue any further remedy.[10] Where a defendant has filed special pleas in addition to pleading the general issue, and demurrers have been sustained to the special pleas, he does not by going to trial on the general issue waive his right to have the court's action upon the

[1] Mo. Pac. R. Co. v. McLiney, 32 App. 166.

[2] Tesson v. Tesson, 11 Mo. 274; Cassatt v. Vogel, 14 App. 317; Hickory County v. Fugate, 143 Mo. 71.

[3] Hickory County v. Fugate, 143 Mo. 71.

[4] Blaine v. George Knapp & Co., 140 Mo. 241.

[5] Marshal v. Platte County, 12 Mo. 88.

[6] Potter v. Herring, 57 Mo. 184; Paxon v. Talmage, 87 Mo. 13.

[7] Paxon v. Talmage, 87 Mo. 13.

[8] Sweeney v. Willing, 6 Mo. 174; Dickey v. Malechi, 6 Mo. 177.

[9] Dunklin County v. Clark, 51 Mo. 60.

[10] State v. Gregory, 38 Mo. 501. The rule is the same in civil as in criminal cases.

demurrers reviewed, if he has properly saved his exceptions to the court's action.[1] So when the answer consists of a general denial and also contains an affirmative defense based on new matter, defendant does not, by proceeding to trial on the general denial after a demurrer has been sustained to the affirmative defense, waive his right to insist that the ruling of the trial court in sustaining the demurrer was erroneous.[2] If, on the sustaining of a demurrer as to one of two defendants, the petition has been dismissed as to him, but it was not demurred to or adjudged insufficient as to the other defendant, it is not necessary that an amended petition should be filed in order to proceed against the latter.[3]

§ 845. **Effect of sustaining — Third pleading.**— If three successive petitions, answers or replies are adjudged insufficient in whole or in part upon demurrer, or the whole or some part of them is stricken out on motion, the party filing such pleading must pay treble costs, and no further petition, answer or reply can be filed, but judgment shall be rendered.[4] This section authorizes only a judgment for treble costs, and not one on the merits.[5] And the fact that such judgment has been entered against the plaintiff will not bar a subsequent action by him on a sufficient petition.[6] It is the duty of the court to render a judgment as provided in this section, regardless of the fact whether plaintiff desires to plead further or not.[7] The above cited section applies to a proceeding to contest a will.[8]

§ 846. **Effect of overruling demurrer.**— If a demurrer to a special plea filed to a bill in equity is overruled, such plea being a complete and full defense to the suit, and plaintiff elects to stand on his demurrer, the court properly dismisses the bill.[9] If the demurrer to the petition is overruled and defendant declines to plead further, all the material allegations of the petition stand confessed. If in such case the damages are unliquidated, a writ of inquiry of damages must be executed, and the damages shown by proof. But if the amount is fixed by any statutory provision, the court may immediately render judgment in favor of the plaintiff.[10]

[1] State to use v. Finn, 19 App. 560. See § 804, *ante;* § 847, *post.*

[2] Powell v. Palmer, 45 App. 236.

[3] Norton v. St. Louis, 97 Mo. 537.

[4] Rev. Stat. 1899, sec. 623.

[5] Gordon v. Burris, 125 Mo. 39.

[6] Bennett v. Southern Bank, 61 App. 297.

[7] Lasar v. Baldridge, 32 App. 362.

[8] Gordon v. Burris, 125 Mo. 39.

[9] Henley v. Henley, 93 Mo. 95.

[10] Scott v. Mo. Pac. R. Co., 38 App. 523.

**§ 847. Effect of answering over.**— Where, after his demurrer to the petition has been overruled, the defendant answers over, he waives all objections to the petition except that it fails to state a cause of action, and that it shows a want of jurisdiction of the court over the subject-matter.[1] Therefore a demurrer on the ground that an unnecessary party has been joined as plaintiff is waived by an answer.[2] An objection to the petition that the suit was brought directly in the name of a person as plaintiff, instead of being brought in the name of the city of St. Louis to the use of such person, is also waived by answering the petition, notwithstanding that a demurrer to the petition on that ground had been previously filed and overruled; a party can only preserve such objection by standing on his demurrer.[3]

[1] Pickering v. Miss. Val. Tel. Co., 47 Mo. 457; West v. McMullen, 112 Mo. 405; Board of Education v. Hackmann, 48 Mo. 243; Jefferson City Sav. Inst. v. Morrison, 48 Mo. 273; Heman v. Glann, 129 Mo. 325; Miller v. Harper, 63 App. 293; Wilson v. St. Louis & S. F. R. Co., 67 App. 443. The effect of pleading over after a motion has been overruled is considered in chapter XXXVI. (See § 868 *et seq.*)

[2] Holliday v. Jackson, 21 App. 660.

[3] Haughey Livery Co. v. Joyce, 41 App. 564. To same effect, Galbreath v. Newton, 45 App. 312.

## CHAPTER XXXIII.

### MOTION TO MAKE DEFINITE AND CERTAIN.


§ 848. The statutory provisions.
849. When the motion is proper.
850. Same — Insufficient allegation of damages.
§ 851. When the motion is unnecessary.
852. What the motion must show.
853. Illustrations of the above rules.


**§ 848. The statutory provisions.**— When the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, and when a pleading fails in any other respect to conform to the requirements of the law, the court may require such pleading to be so amended as to be made definite and certain, and to otherwise conform to the law.[1] It has been doubted whether the court may upon its own motion make such an order; and the supreme court has said that it would seem to be implied by the language of the statute that it must be done on motion of the adverse party.[2] But this doubt no longer exists, for the court *in banc* says in *Leete v. State Bank:*[3] "It was the duty of plaintiff, in order to have apprised the defendant bank of the nature of her cause of action, and her duty to the court, to have stated these dates, and the duty of the lower court under section 2057[4] to have required that these uncertain allegations of the petition in this regard be made definite and certain. And though the defendant bank might have filed a motion for the purpose mentioned, yet it was not bound to do so, since it was the primary duty of plaintiff to make a clear and unequivocal statement of her allegations, and this *onus* she could not cast on her adversary by failing in her duty in this regard."[5]

[1] Rev. Stat. 1899, sec. 612; Atteberry v. Powell, 29 Mo. 429; Cockerill v. Stafford, 102 Mo. 57; Smith v. Chicago & Alton R. Co., 119 Mo. 246. That motion must be filed before trial, see § 789, *ante.*

[2] State ex rel. v. Oddle, 42 Mo. 210.

[3] 141 Mo. 574.

[4] Now sec. 612.

[5] 141 Mo., p. 581. The court in that case also cites sec. 676 (Rev. Stat. 1899). That section provides that pleadings shall be so construed as to discourage negligence and deceit, to prevent delay and to secure parties from being misled. See also § 851, *post.*

**§ 849. When the motion is proper.**— Indefiniteness and uncertainty in a petition are properly reached by motion, and not by demurrer.[1] Such a motion is proper where the petition fails to set forth a particular statement of the items of an account, as required by section 630.[2] But if the pleading does not comply with the statutory requirement that the items of the account sued on shall be set forth in the pleading or attached to it, the adverse party has his choice, either to move to have the pleading made more definite, or to object to the introduction of any evidence in support of the account.[3] And if such objection is made, it is error to admit any evidence in support of the account.[4] If the statute is substantially complied with, any mere lack of particularity in the items will be cured unless the adversary fails to move that the account be made more definite and certain.[5] An answer or reply which contains a denial of each and every allegation contained in the petition "except as hereinafter admitted" is defective, and a motion will lie to make it more definite and certain.[6] But if advantage of the defect is not taken by such motion, it cannot be raised at the trial.[7]

**§ 850. Same — Insufficient allegation of damages.**— Where the defendant claims that the allegations of special damages in the petition are not sufficiently explicit to advise him of the elements of damage, his course is to move to have the petition made more definite and certain.[8] If the petition is defective by reason of containing allegations of damage to several head of cattle sustained at different dates, the defect cannot be reached by a motion to make definite and certain, but the defendant must make his motion to require the plaintiff to elect.[9]

**§ 851. When the motion is unnecessary.**— If the answer is so indefinite that it is difficult to determine what is admitted and what denied, the court will construe it most strongly against the defendant, and plaintiff is not bound to file a motion that it be made more definite and certain.[10]

[1] McAdam v. Scudder, 127 Mo. 345.

[2] Rev. Stat. 1899; Baker v. Raley, 18 App. 563.

[3] Dawson v. Quillen, 61 App. 672. That the objection may also be raised by demurrer, see § 826, *ante*.

[4] Labadie v. Maguire, 6 App. 573. See also § 853, n. 4, p. 436.

[5] Meyer v. Chambers, 68 Mo. 626.

[6] Long v. Long, 79 Mo. 644; Bradley v. Phœnix Ins. Co., 28 App. 7; Walker v. Phœnix Ins. Co., 62 App. 209.

[7] Collins v. Trotter, 81 Mo. 275.

[8] State to use v. McHale, 16 App. 478.

[9] Dooley v. Mo. Pac. R. Co., 36 App. 381.

[10] Snyder v. Free, 114 Mo. 360. See also § 848, *ante*. The court apparently considers this case and the one cited in § 848 exceptions to the rule as to waiver announced in chapter XXXVI.

§ 852. **What the motion must show.**— A motion to make a pleading more definite and certain, or to require it in any other particular to conform to the requirements of the law, must with reasonable certainty set forth the particulars in which the pleading is uncertain or otherwise defective.[1]

§ 853. **Illustrations of the above rules.**— Where the action was for injuries resulting from a defective sidewalk on a public street, and the petition described the injury as having taken place on the south side of one street and between two other streets, if this description of the place of the injuries was deemed by defendant inadequate, it should have filed its motion to make the description more definite.[2] An action was brought against a railroad company for obstructing a road by the construction of its road-bed, and defendant contended that the petition was defective because it failed to show whether the road alleged to have been obstructed was a public or a private one. It was held that defendant could not avail itself of the defect by objecting to the admission of any testimony, but should have moved to make the petition more definite and certain.[3] In an action to recover the balance of an account, there was an allegation in the petition that an itemized statement of the account was attached thereto, while in fact no such statement was attached; it was held that the court below erroneously overruled a motion of defendant to have the petition and account made more definite.[4] So, too, in an action against the estate of a decedent in course of administration, where the petition set up a claim in gross for sundry services rendered at divers times during a period of twenty years in the life-time of the deceased, without specifying the items upon which the recovery was sought or their respective values, it was held that the court might, on motion of the executor, require the petition to be made more definite and certain in these respects, and, if plaintiff failed to comply with the order, the court might dismiss the case.[5] Where an action was brought against a railroad company to recover a rebate, which plaintiff alleged the company had agreed to allow him on freight shipped by him, it is not error to deny defendant's motion that the petition be made more definite and certain by stating where and by what officers the alleged contract was made, and whether it was oral or in writing; nor did the

[1] O'Connor v. Koch, 56 Mo. 253.

[2] Allen v. Springfield, 61 App. 270.

[3] Autenrieth v. St. Louis & S. F. R. Co., 36 App. 254.

[4] Chillicothe Savings Ass'n v. Morris, 52 App. 612. See also § 849, *ante*.

[5] McAdam v. Scudder, 127 Mo. 345.

court err in overruling defendant's motion to require the contract, if in writing, to be filed in court for the defendant's inspection, it appearing that the contract was not in writing, and the terms of the contract being fully set out in the petition.[1] Where in a proceeding for partition the allegations of the petition were substantially that the annual rents and profits of the premises were $1,000, and that the co-tenant was in the exclusive reception of such rents and profits and refused plaintiff any part thereof, the petition is not so definite and certain as it might be that defendant had excluded plaintiff from the joint occupancy of the land, and a motion to make it more definite and certain in that respect would lie.[2]

[1] Christie v. Mo. Pac. R. Co., 94 Mo. 453.

[2] Holloway v. Holloway, 97 Mo. 628.

In chapter XXXI the question of the time when the motion in question must be filed is considered.

# CHAPTER XXXIV.

## MOTION TO STRIKE OUT.


§ 854. The rule.
855. What defects are reached by motion.
856. Motion admits facts well pleaded.
§ 857. Motion must be in writing and specific.
858. Time for filing motion.
859. Disposition of the motion.


**§ 854. The rule.**—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of the adverse party.[1] Matter in the answer which is not responsive to the petition will be stricken out on motion.[2] So will such parts of an answer as present no defense.[3] If the answer neither admits nor denies the making of the contract set up in the petition, it is evasive and may be stricken out.[4] If the reply contains redundant, impertinent or irrelevant matter, and yet is not obnoxious to a demurrer, such matter may be stricken out on motion.[5] The objection that the reply is a departure from the petition cannot be raised by a motion to strike out the reply for the reason that it contains new matter inconsistent with the allegations of the petition, provided there is any averment or statement in the reply which puts in issue any of the new matter of the answer, and the motion attacks the reply as a whole.[6]

**§ 855. What defects are reached by motion.**—It seems that an improper joinder of causes of action in the same count must be reached by a motion to strike out, and not by a demurrer.[7] An objection for improperly blending statements which tend to constitute a defense on the merits and those relating to a counterclaim may be raised by a motion to strike out.[8] The defect of duplicity in a petition must be reached by a motion to strike out; even at common law it could not be reached by a motion in arrest, if no special demurrer had been filed.[9]

[1] Rev. Stat. 1899, sec. 612.

[2] Singleton v. Pacific Railroad, 41 Mo. 465.

[3] Phillips v. Evans, 38 Mo. 305; Houston v. Lane, 39 Mo. 495.

[4] Miller v. Chicago & Alton R. Co., 62 App. 252.

[5] Kinney v. Miller, 25 Mo. 576.

[6] Philibert Mfg. Co. v. Dawson, 77 App. 122.

[7] Farmers' Bank v. Bayliss, 41 Mo. 274. Consult also ch. XXXII.

[8] Kinney v. Miller, 25 Mo. 576.

[9] St. Louis v. Weitzel, 130 Mo. 600.

**§ 856. Motion admits facts well pleaded.**— A motion to strike out, like a demurrer, confesses the facts pleaded in that part of the pleading at which the motion is aimed.[1] The same is true of a motion to dismiss.[2]

**§ 857. Motion must be in writing and specific.**— Under section 640,[3] all motions must be accompanied by a written specification of the reasons upon which they are founded, and no reason which is not so specified can be urged in support of the motion.[4] If the motion is to strike out certain parts of a pleading, it should contain the parts sought to be stricken out, or those parts should be so designated that they can be readily ascertained.[5] The part to be stricken out must be set out in full; it is not sufficient to designate it by reference to the page and the line of the page.[6] If such course is taken, the appellate court will not review the action of the lower court upon the motion.[7]

**§ 858. Time for filing motion.**— A motion to strike out part of a petition must be presented before the answer is filed; it certainly comes too late if it is not filed until the case is called for trial.[8]

**§ 859. Disposition of the motion.**— If, after a motion is made to strike out the answer, defendant does not appear on the calling of the case, and judgment is thereupon given for the plaintiff without a formal disposition of the motion, defendant cannot complain.[9] A motion to strike out a pleading as a whole must, like a general demurrer, be overruled if any part of the pleading attacked is sufficient.[10] And as a motion to strike out a reply as a whole, and not some specific part of it, must be governed by the rules applicable to general demurrers, if there is in such case any averment or statement in the reply which puts in issue any of the new matter set forth in the answer, the motion should be overruled.[11] Thus where, in an action against a carrier for failure to deliver the goods, there was an averment in the answer

[1] Wonderly v. Lafayette County, 150 Mo. 635.

[2] Butler v. Lawson, 72 Mo. 227.

[3] Rev. Stat. 1899.

[4] State ex rel. v. Oddle, 42 Mo. 210; Paddock v. Somes, 102 Mo. 226.

[5] Pearce v. McIntyre, 29 Mo. 423; Jackson v. Bowles, 67 Mo. 609; State ex rel. v. Fleming, 147 Mo. 1; Anderson v. Stapel, 80 App. 115.

[6] Patterson v. Hollister, 32 Mo. 478.

[7] Robinson v. Rice, 20 Mo. 229.

[8] Sheehan & Loler Trans. Co. v. Sims, 62 App. 224.

In chapter XXXI the question of the time when a motion must be filed is further considered.

[9] Webb v. Stevens, 14 Mo. 480.

[10] Herf Chemical Co. v. Lackawanna Line, 78 App. 305.

[11] Philibert Mfg. Co. v. Dawson, 77 App. 122.

that the goods arrived on time, and the reply took issue on that averment, the motion to strike out the reply was properly overruled, whatever might have been its other defects. Where the action is one at law, and the motion is directed at certain parts of the answer, if the parts thus attacked constitute no defense to the action at law, and do not standing alone constitute an equitable defense, yet if they state a fact which it is proper for the court to consider with other circumstances in determining whether or not the relief asked by plaintiff should be granted, the motion is properly overruled.[1] If the action of the court in striking out the answer is erroneous, and defendant intends to avail himself of the error, he must let judgment go and stand upon his exceptions to the court's action.[2]

[1] Ridgeway v. Herbert, 150 Mo. 606.

[2] Fuggle v. Hobbs, 42 Mo. 537. The effect of pleading over after a motion has been overruled is considered in chapter XXXI. See § 806.

# CHAPTER XXXV.

## MOTION TO ELECT.


§ 860. Causes of action improperly united.
861. Inconsistent counts.
§ 862. One cause of action stated in several counts.
863. Electing between defenses.
864. Illustrations of the rule.


**§ 860. Causes of action improperly united.**— Where several causes of action are improperly united in one count, a motion to require the plaintiff to elect between the causes of action is the proper remedy.[1] Unless defendant makes such motion he will be deemed to have waived the objection.[2]

**§ 861. Inconsistent counts.**— Where several counts in the same petition are inconsistent, so that the proof of one necessarily disproves the other, the court should, if requested by the defendant to do so, and may of its own motion, compel the plaintiff at any time to elect on which one of the inconsistent counts he will proceed to trial. If, on the other hand, there is no necessary inconsistency between the counts, but they are for the same cause of action, so that only one recovery can be had, it would seem to be the better practice that the court should, if requested so to do, and may of its own motion, upon the close of plaintiff's evidence, compel him to elect on which of the several counts he will take the verdict of the jury, as this practice alone will enable appellate courts to review intelligently the rulings of the trial courts upon the evidence and instructions.[3] But plaintiff will not be compelled to elect in such case unless there is so clear an inconsistency between the different causes of action that the proof of one necessarily disproves the other.[4]

**§ 862. One cause of action stated in several counts.**— The trial court should not require the plaintiff to elect where all the

[1] Mooney v. Kennett, 19 Mo. 551; Dougherty v. Wabash, St. L. & Pac. R. Co., 19 App. 419; Kern v. Pfaff, 44 App. 29; Childs v. Kansas City, St. J. & C. B. R. Co., 117 Mo. 414.

[2] Fadley v. Smith, 23 App. 87; Wallace v. Kansas City & S. R. Co., 47 App. 491; Kansas City T. & G. Co. v. Neiswanger, 50 App. 389; Harris v. Wabash R. Co., 51 App. 125.

[3] Roberts v. Quincy, O. & K. C. R. Co., 43 App. 287, 289.

[4] Seiter v. Bischoff, 63 App. 157.

matters alleged, though stated separately, constitute together but one cause of action.[1] And if one and the same cause of action is stated in different counts, while the court may strike out either one of them, its refusal to compel plaintiff to elect on which count he will go to trial is not reversible error.[2] If the different wrongs complained of in the different counts of the petition constitute a continuous and permanent injury resulting from the same act done by the defendant, a motion to require the plaintiff to elect is properly overruled.[3] The objection that a petition which constitutes but a single cause of action contains superfluous and redundant matter which might be stricken out furnishes no ground for sustaining a motion to elect.[4]

**§ 863. Electing between defenses.**— If the defenses set up in the answer are inconsistent, defendant may be compelled, before entering upon his proof, to elect between them.[5] But this rule applies only to cases where if one defense be true the other must necessarily be false; for the defendant cannot be compelled to elect between two defenses, both of which may be true in fact.[6]

**§ 864. Illustrations of the rules.**— The following cases furnish illustrations of circumstances under which a plaintiff will or will not be compelled to elect as between different counts or causes of action: If the first count declares upon a contract, and the second count among other items for money laid out and expended by plaintiff at defendant's request, plaintiff will not be required to elect.[7] If the petition is defective because it contains allegations of damages to several head of cattle sustained at different dates, plaintiff will be required to elect.[8] But where plaintiff seeks to recover for a continuous injury by animals trespassing on his growing crop, in consequence of a continuing failure on defendant's part to perform its duty, he will not be required to elect.[9] Plaintiff sued upon a written promise to pay a draft, and the petition was in two counts. In the first the

[1] McNees v. Mo. Pac. R. Co., 22 App. 224.

[2] Freet v. Kansas City, St. J. & C. B. R. Co., 63 App. 548.

[3] Autenrieth v. St. Louis & S. F. R. Co., 36 App. 254.

[4] Griffith v. Mo. Pac. R. Co., 98 Mo. 168.

[5] Fugate v. Pierce, 49 Mo. 441.

[6] Keane v. Kyne, 2 App. 317; Lee v. Dodd, 20 App. 271.

As to the time when the motion to elect must be made, consult chapter XXXI. (See §§ 789, 797.)

[7] Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo. 325.

[8] Dooley v. Mo. Pac. R. Co., 36 App. 381.

[9] Ray v. St. Louis, I. M. & S. R. Co., 25 App. 104. See also Autenrieth v. Railroad, 36 App. 254.

writing was declared on as an acceptance of the draft, and in the second plaintiff sued for a breach of the promise to accept. It was held that plaintiff could not be compelled to elect.[1] In an action to recover for personal injuries, the petition alleged that the accident was due to the defective condition of an elevator, knowledge of which was chargeable to the defendant, and also set up the violation of a city ordinance relating to inspection as a cause of the injury. It was held that the petition did not state two causes of action, so as to put plaintiff to an election.[2] In an action for the death of plaintiff's husband from injuries received while employed in defendant's mine, the petition contained two counts, the first under section 8822,[3] requiring the owner to keep timber for props, and the second, an attempt to unite this provision with the general damage act. The court properly overruled a motion to compel plaintiff to elect.[4] In an action against a sheriff, the petition charged him in a single count with failure to levy upon goods and lands of the execution debtor, and with failure to make return of the execution at the proper term, and there was but one prayer for damages predicated upon both causes of action. It was held that the plaintiff might be compelled to elect.[5] If, in an action on a breach of contract between employer and employee, plaintiff counts on both the theory of a breach of the contract of hiring and also on a *quantum meruit*, plaintiff may be compelled to elect.[6]

[1] Brinkman v. Hunter, 73 Mo. 172.
[2] O'Neil v. Young, 58 App. 628.
[3] Rev. Stat. 1899.
[4] Boemer v. Central Lead Co., 69 App. 601.
[5] Stevenson v. Judy, 49 Mo. 227.
[6] Ehrlich v. Ætna Life Ins. Co., 88 Mo. 249.

## CHAPTER XXXVI.

### HOW DEFECTS IN PLEADING MAY BE WAIVED.


§ 865. General principles.
866. By failing to raise objection at the proper time.
867. Same — Illustrative cases.
868. By pleading to the merits.
869. Same — Defect of parties.
870. Same — In case of partners.
871. Same — Improper mingling of causes of action.
872. Waiver by pleading to amended pleading.
873. By going to trial.
875. The rule applies to answers.
876. Objections not made in trial court.


**§ 865. General principles.**— Objections which cannot be properly made either by demurrer or answer must be made by a motion of some kind, either a motion to strike out or a motion to make more definite and certain, according to the circumstances of the case. All defects of this character are waived unless taken by a motion of one kind or the other.[1] But where a plaintiff, a married woman, bases her suit on the fact that the property sued for was purchased with her separate property, which was bequeathed to her in her own right, but fails to definitely allege the date of her marriage and that of the death of the testator under whom she claims, so that the court may see under what statute her right was acquired, it is the duty of the trial court to require her to so amend her petition as to make it definite in these particulars; and the objection is not waived because defendant fails to file a motion requiring her to amend her petition in this respect.[2]

**§ 866. By failing to raise objection at the proper time.**— Defects which do not go to the very essence of the proceeding, which affect only form or the method of stating the facts, will be waived unless advantage is taken of the defects at the proper time. But if the petition does not state facts sufficient to constitute a cause of action, this is such a defect as is never waived. It may be raised at any time so long as the cause is pending and

[1] Sims v. Field, 24 App. 557; Burke Mfg. Co. v. Steamboat Saltzman, 42 App. 85; Harford v. Boyes, 56 App. 139; Haynes v. Trenton, 123 Mo. 326; Walters v. Hamilton, 75 App. 237.

[2] Leete v. State Bank, 141 Mo. 574. See also § 851, *ante*.

undetermined. It may be raised either in the court of first instance or in that of last resort; and it may be raised by either court of its own motion.[1] If the allegations of a pleading are uncertain or vague, but the adverse party does not seasonably move by some proper motion for their correction, he cannot at the trial raise the objection by asking that all evidence in support of the pleading be excluded.[2]

**§ 867. Same — Illustrative cases.**— In an action on a *quantum meruit* the petition alleged that a correct statement of the labor and material sued for was annexed. In the statement there was an item "of work last fall," and defendant objected to any evidence as to this item. But it was held that the objection came too late, defendant having failed to file his motion to make the petition more definite.[3] Where a defendant is not a necessary party to a suit, but fails to take advantage of this defect by demurrer, or, if necessary, by answer, and goes to trial on the petition, he waives the defect, and cannot at the trial ask to have his name stricken out.[4] If all of several tenants in common do not join in an action of trespass on the property, defendant must take advantage of that fact before going to trial.[5] Where different causes of action are blended in the same count, and defendant fails to demur, he waives the joinder, provided the error appears on the face of the petition; if it does not, and he fails to take advantage of the defect by his answer, it will be waived.[6] If it is claimed that in a petition in replevin the description of the property is insufficient or uncertain, an objection on this ground must be made by the defendant at the first available opportunity. If he omits to do so, pleads to the merits and goes to trial, he cannot afterwards make the objection.[7]

**§ 868. By pleading to the merits.**— Where defendant pleads to the merits, he waives objection to all merely formal defects, and will not be heard at the trial or on appeal to object that the petition does not properly state a cause of action unless it ap-

[1] McPeak v. Mo. Pac. R. Co., 128 Mo. 617. So, too, the objection that the court has not jurisdiction over the subject-matter is never waived. Rev. Stat. 1899, sec. 602. See § 868, *post*.

[2] Coombs Com. Co. v. Block, 130 Mo. 668. This subject is further considered in § 876, *post*.

[3] Kansas City Tile & Gravel Co. v. Neiswanger, 50 App. 389.

[4] Soeding v. Bartlett, 35 Mo. 90.

[5] Thompson v. Chicago, R. I. & Pac. R. Co., 80 Mo. 521.

[6] Sinclair v. Mo., K. & T. R. Co., 70 App. 588.

[7] Crum v. Elliston, 33 App. 591.

That objection as to the adding of a party may be waived, see § 872, n. 8, p. 448.

pears that there is an entire failure to state a cause of action.[1] Because by pleading to the merits defendant waives all objections to the petition, except that it does not state facts sufficient to constitute a cause of action, and that the court has no jurisdiction over the subject-matter of the action.[2] Inherent want of jurisdiction cannot be waived, although, it may be added, objection to the vendee may be.[3] If a matter material to plaintiff's cause of action is not expressly averred in the petition, but is necessarily implied from what is expressly averred, so that the defect is cured by verdict, defendant must make his objection by demurrer or motion to strike out; a plea to the merits waives such an objection.[4] A general charge of negligence is sufficient after answer.[5] An objection that the instrument sued on was not filed with the petition is waived by pleading to the merits.[6] So, too, is the objection that defendant failed to serve plaintiff with a copy of a pleading where he is required to do so by the statute.[7]

**§ 869. Same — Defect of parties.**— Where a defect of parties is apparent on the face of the petition, the objection must be made by demurrer or it will be waived.[8] And the same rule applies to the objection that the petition is defective by reason of a nonjoinder of parties,[9] or that some of the plaintiffs are improperly made parties to the suit,[10] or that a defendant is improperly joined.[11] If a petition against two defendants shows a good cause of action as against one, a joint demurrer is improperly sustained.[12] Only the defendant who is improperly joined can demur.[13] If there is a joint demurrer by all the defendants it should be overruled as to those properly made parties.[14] If a defendant is not a necessary party to a suit he must take advantage of the defect by a demurrer, for if he goes to trial he cannot then ask to have his name stricken out.[15] The fourth subdivision of section 588,[16] permitting a demurrer where there is a defect of parties, and sec-

[1] Grove v. Kansas City, 75 Mo. 672; Hurst v. Ash Grove, 96 Mo. 168; Johnson v. Mo. Pac. R. Co., 96 Mo. 340; Buck v. People's R. Co., 46 App. 555.

[2] Paddock v. Somes, 102 Mo. 226; Seckinger v. Philibert Mfg. Co., 129 Mo. 590.

[3] Johnson v. Detrick, 152 Mo. 243.

[4] Malone v. Fidelity & Casualty Co., 71 App. 1.

[5] Foster v. Mo. Pac. R. Co., 115 Mo. 165.

[6] White v. Collier, 5 Mo. 82.

[7] Cave v. Hall, 5 Mo. 59.

[8] Dodson v. Lomax, 113 Mo. 555; Finney v. Randolph, 68 App. 557.

[9] Kerr v. Bell, 44 Mo. 120.

[10] Russell v. De France, 39 Mo. 506.

[11] Boland v. Ross, 120 Mo. 208.

[12] Bank of Missouri v. Young, 35 Mo. 371.

[13] Alnutt v. Leper, 48 Mo. 319.

[14] Ancell v. Cape Girardeau, 48 Mo. 80; Alnutt v. Leper, 48 Mo. 319; Brown v. Woods, 48 Mo. 330.

[15] Soeding v. Bartlett, 35 Mo. 90.

[16] Rev. Stat. 1899.

tion 602,[1] which provides that if the objection is not taken either by demurrer or answer it shall be deemed to be waived, apply to an interplea.[2]

§ 870. **Same — In case of partners.**— Where one partner has been defrauded by his copartner by a transfer of property, the fact that in an action against the fraudulent transferee of the property the colluding partner is not joined can be taken advantage of only by demurrer or answer.[3] In an action on a promissory note the defendant pleaded a counter-claim for services rendered as an attorney, and the reply was a general denial. The evidence tended to show that the services were rendered by the defendant and another as partners. It was properly held by the trial court that the fact of the partnership did not affect the counter-claim, as it amounted only to a defect of parties, and this was waived by a failure to set it up in the reply.[4]

§ 871. **Same — Improper mingling of causes of action.**— An objection to the improper joinder of counts is waived by pleading over;[5] also the objection that several causes of action are stated in one count.[6] From an opinion of Judge Lewis I make the following extract as bearing upon this question: "The new system," he says, "prescribes certain exact rules for the joining of various causes of action in the same petition, but for very different reasons, and with very different penalties for their violation.[7] A misjoinder involves no incongruous admixture of forms or of writs, because there is but one form and but one writ for all possible cases. There is no reason why it should be fatal to the action *per se*, and the law does not declare it so. A cause of action *ex delicto* must not be united with one *ex contractu*, but why? The statute forbids it, and if a reason for the statute must be found, it seems to appear in the policy which refuses to subject a defendant, against his will, to diverse styles of warfare in the same fight. Hence it is provided that he may nevertheless waive all such objections by refusing to demur."[8]

[1] Rev. Stat. 1899.

[2] Scott-Force Hat Co. v. Hombs, 127 Mo. 392.

[3] Hagar v. Graves, 25 App. 164.

[4] Winton State Bank v. Harris, 54 App. 156. And it was also held that the same rule applied to evidence tending to show that defendant had assigned the counter-claim.

[5] Williamson v. Fischer, 50 Mo. 198.

[6] House v. Lowell, 45 Mo. 381; Pickering v. Miss. Val. Tel. Co., 47 Mo. 487; Thompson v. School District, 71 Mo. 495; Union Bank v. Dillon, 75 Mo. 380; Baker v. Raley, 18 App. 562. See also in this connection § 876, *post*.

[7] As will be seen from the context, he means "different from those of the common law."

[8] Sumner v. Tuck, 10 App. 269, 277.

§ 872. **Waiver by pleading to amended pleading.**— The right of objecting to the filing of an amended pleading is waived by pleading to it.[1] Section 622[2] provides that, after two pleadings by the same party have been adjudged insufficient, the party filing them may file a third pleading, if he files it *instanter*. Nevertheless, if the court grants time for this purpose, and the adverse party answers or replies to the pleading subsequently filed, he waives all right to object that it was not filed *instanter*.[3] If the defendant pleads a general denial to a third amended petition, which changes the cause of action set out in the original petition, and goes to trial on the pleadings as thus made up, he waives all objection to a fourth amended petition containing allegations similar to those contained in the third, on the ground that it was a departure from the original petition.[4] So if the third amended petition is but a repetition of the original petition, and a motion to strike it out is overruled, the objection to it is waived if defendant answers it, although a demurrer has been sustained to the first amended petition. And by so pleading over, defendant also waives the objection that the third amended petition changes the cause of action.[5] For if defendant claims that an amended petition changes the cause of action, he must attack the amendment at the time it is filed by motion to strike it out, or by some other proper motion; if he files an answer to it he accepts the amendment and waives all objection to it.[6] Moreover, if defendant makes the objection and his objection is overruled, and he then goes to trial on the amended petition, he waives all error in permitting the amendment.[7] The objection that one was improperly made a party plaintiff after the filing of the original petition must be made by demurrer or answer or it will be waived.[8]

§ 873. **By going to trial.**— All objections as to form must be taken before the parties proceed to trial, as objections of that character will not receive any countenance after a trial is had on the merits.[9] The objection that the execution of the instrument sued on was not denied under oath cannot be raised for

[1] Beardslee v. Morgner, 4 App. 139; Hill v. Morris, 21 App. 256; Ward v. Pine, 50 Mo. 38.

[2] Rev. Stat. 1899.

[3] Hamlin v. Carruthers, 19 App. 567.

[4] Spurlock v. Mo. Pac. R. Co., 104 Mo. 658.

[5] Sanguinette v. Webster, 153 Mo. 343.

[6] Scoville v. Glassner, 79 Mo. 449; Spurlock v. Mo. Pac. R. Co., 104 Mo. 658; Matthews v. Perdue, 79 App. 149; Bender v. Zimmerman, 135 Mo. 53; Hurley v. Mo. Pac. R. Co., 57 App. 675.

[7] Hubbard v. Quisenberry, 32 App. 459; State ex rel. v. Gage, 52 App. 464; Hurley v. Mo. Pac. R. Co., 57 App. 675.

[8] Ragan v. Kansas City & S. R. Co., 111 Mo. 456.

[9] Saulsbury v. Alexander, 50 Mo. 142.

the first time in the appellate court; if no motion was made for judgment on the pleadings, no objection made to the introduction of evidence on the issues, and the motion for a new trial did not specify that the answer failed to deny the execution of the contract under oath, the point will be deemed waived.[1] Objections which go to the definiteness of the petition are waived if not presented before verdict.[2] So are all objections which do not go to the foundation of the plaintiff's cause of action.[3] If a petition is objected to for the first time at the trial, it will be upheld if it states a cause of action, although it might have been adjudged insufficient on demurrer or motion.[4] But the objection that the petition fails to state a cause of action is never waived, and such defect is not cured by verdict or judgment.[5]

§ 874. Where throughout the trial defendant treated the petition as sufficiently tendering the issue of defendant's negligence, and no objection was made to the introduction of evidence by plaintiff on this issue, and defendant presented this issue to the jury by instructions, he can raise no objection to the petition after verdict.[6] So if both parties, by the introduction of evidence and by their instructions, treat an issue as properly before the jury, the objection that such issue was not within the averments of the petition is waived.[7]

**§ 875. The rule applies to answers.**—While an answer which denies the material allegations of the petition, without specifying what allegations are deemed material, is bad pleading, yet if no objection is made on this ground in the trial court, and the parties at the trial treat it as sufficient, its sufficiency will not be considered by the appellate court.[8] Where a defective plea in abatement was filed by defendant in an attachment proceeding, but plaintiff took no exception to the plea before the trial or during the progress of the trial, treating it as putting in issue the truth of the facts alleged in the affidavit, it will be held good after verdict.[9] While an administrator cannot, to the detriment of the creditors, distributees or legatees, discharge a debt due the estate by the cancellation of his individual liability to a debtor

[1] Kelly v. Thuey, 143 Mo. 422.
[2] State to use v. Berning, 74 Mo. 87.
[3] Williams v. Bugg, 10 App. 586.
[4] Benham v. Taylor, 66 App. 308.
[5] Weber v. Union Mut. Life Ins. Co., 5 App. 51; Brown v. Shock, 27 App. 351; Walker v. Point Pleasant, 49 App. 244.
[6] Covey v. Han. & St. J. R. Co., 27 App. 170.
[7] Hilz v. Mo. Pac. R. Co., 101 Mo. 36. See next succeeding section.
[8] Smith v. Lindsey, 89 Mo. 76.
[9] Bailey v. O'Bannon, 28 App. 39.

of the estate, yet such debtor is entitled to a credit by way of equitable set-off, where its allowance will not affect the rights of any one except those of the administrator himself as heir or devisee, and by means of this allowance justice will be done between the debtor and the administrator. And if evidence of such a set-off was received without objection, and was thus before the court with the implied admission that the pleadings were broad enough to allow its reception, such judgment may be given upon the facts as the right of the matter requires, although there was no special plea of equitable set-off.[1]

§ 876. **Objections not made in trial court.**— Where two causes of action are improperly joined in one count, unless an objection on that ground is made in the trial court, at least by a motion in arrest,[2] it will be considered as waived.[3] So if no objection is made, before the cause is submitted to the jury, that the petition improperly joins an action on contract with one for a tort, it will then be too late, if there is no claim of surprise; and this is true, though the evidence warrants a recovery on contract, but the action has been treated both by court and counsel as one *ex delicto*.[4] A petition contained two counts: one on contract and the other in *assumpsit*, but both counts covered the same matter. At the close of the evidence plaintiff dismissed as to the second count and went to the jury on the first. It was held that, even if the court erred in overruling a motion to compel plaintiff to elect, its error would not be reviewed after verdict.[5] If in an action for

[1] State ex rel. v. Donegan, 94 Mo. 66.

[2] Or by a motion to compel plaintiff to elect. Wallace v. Kansas City & So. R. Co., 47 App. 491.

[3] Brown v. Home Savings Bank, 5 App. 1; Brent v. Shelly, 5 App. 581; Peckham v. Lindell Hotel Co., 9 App. 459. The decision in Gray v. Payne, 43 Mo. 203, no longer possesses authority. In fact, it is expressly overruled in Sweet v. Maupin, 65 Mo. 65, 72.

[4] Sumner v. Tuck, 10 App. 269.

[5] Gardner v. Crenshaw, 122 Mo. 79.

In the case cited just above (Sumner v. Tuck, 10 App. 269) the court explains at some length the reasons upon which these rules rest. It says, speaking through Lewis, P. J., that a cause of action *ex delicto* cannot be united with one *ex contractu* because the statute forbids it, for the reason that a defendant cannot be subjected against his will to diverse styles of warfare in the same fight. But if such warfare is not "against his will," the misjoinder is not fatal. "For," says the learned judge, "it is provided that he may nevertheless waive all such objections by refusing to demur. If he accepts the fight as tendered, the law will not permit him afterwards to object, nor will it find that by reason of the misjoinder the foundation of the action is insufficient to sustain it. The statute is explicit that if the objection of misjoinder be not raised by demurrer or answer it shall be deemed to be waived." (p. 277.) That case was one in which the first count stated facts sufficient to constitute a cause

slander the petition joins in one count words imputing to the plaintiff different crimes, the objection is waived unless defendant moves for a rule requiring the plaintiff to elect.[1]

of action *ex delicto*, but upon rejecting certain words as surplusage there remained a sufficient statement of an action *ex contractu*. In its *ex delicto* capacity it was properly joined with the second count, which was one *ex delicto*, and therefore a demurrer could not reach it. But if it were to be treated as a count for money had and received, that is, one *ex contractu*, there would be a misjoinder. The court held that, whether or not a demurrer would have been sustained to the petition on the ground of a misjoinder, such demurrer would at least have shown the defendant's objection, and would have prevented a waiver of the defect, if any defect there were. But inasmuch as the defendant failed to demur and failed to raise the objection in his answer, he could not raise the question whether the petition was defective by interposing a demurrer to the evidence at the close of plaintiff's case.

[1] Christal v. Craig, 80 Mo. 367.

Consult in this connection, § 866, *ante*.

## CHAPTER XXXVII.

### HOW DEFECTS IN PLEADING MAY BE CURED.


§ 877. Defects which cannot be cured.
878. Defect cannot be cured by agreement of parties.
879. Defects cured by evidence.
880. By subsequent pleading of same party.
881. By the adversary's pleading.
882. Same — Instances.


**§ 877. Defects which cannot be cured.**— It has been shown in the preceding chapter that defects of substance cannot be waived. *A fortiori*, such defects cannot be cured. Thus the fundamental sufficiency of a petition always remains an open question.[1] And it has been held that, where a bill is brought against two defendants to set aside two deeds of trust, one of which is executed by both defendants and the other by only one of them, the defect cannot be cured by dismissing as to the party who did not execute the mortgage mentioned in the second count, if he did execute the one mentioned in the first count, because he was a necessary party to a suit seeking to annul that mortgage.[2]

**§ 878. Defect cannot be cured by agreement of parties.**— A defective petition cannot be cured by an agreement of the parties, since the sufficiency of a pleading is a question of law, as to which no valid agreement can be made.[3]

**§ 879. Defects cured by evidence.**— Though statements in a pleading are defective and uncertain, yet their defects and uncertainties may be cured by evidence given in support of them.[4]

**§ 880. By subsequent pleading of same party.**— If a petition fails to state one or more of the elements essential to a recovery, the defect is not cured by inserting such allegations in the reply.[5] Thus where, in an action against the drawer of a bill of exchange, the acceptance was a conditional one, and the petition contained no averments to the effect that the drawer had knowl-

[1] Epperson v. Postal Telegraph Cable Co., 155 Mo. 346. See § 866, *ante*.

[2] Jamison v. Culligan, 151 Mo. 410.

[3] Wells v. Covenant Mut. Ben. Ass'n, 126 Mo. 630.

[4] Murphy v. North British Ins. Co., 70 App. 78. This subject is more fully discussed in considering the statute of *jeofails*, § 886 *et seq.*, *post*.

[5] Taylor v. Newman, 77 Mo. 257.

edge that the acceptance was conditional, or had in any way waived his right to an absolute acceptance, the defect in the petition is not cured by reason of the fact that the reply contained an averment that, after non-payment of the bill, the drawer, with knowledge of the acceptance and the non-payment, agreed to pay it.[1]

**§ 881. By the adversary's pleading.**— The rule is well settled that a pleading, defective by reason of the omission of some material allegation, may be aided by the pleading of the adverse party.[2] Any omission to state a material fact in a pleading will be obviated if the pleading of the opponent puts the matter in issue.[3] Thus an insufficient averment in a petition may be helped out by the answer.[4] For if the omitted fact is denied in the answer, the defect in the petition will be cured.[5] The petition may be aided by the answer, notwithstanding it is fatally defective;[6] because, if the omitted allegation is supplied by the pleading of the adverse party, it is the same as if it were inserted in the party's own pleading.[7] And if the averments of the answer are such as to supply the defects in the petition, such an answer in effect fills the purpose of an amended petition.[8] Still in all these cases the recovery is on the petition and not on the answer.[9]

**§ 882. By pleading of adversary — Instances.**— Where, in a proceeding for partition, with a prayer for an accounting as to the rents and profits of the land, the petition fails to distinctly charge that defendant had excluded plaintiff from the joint occupancy of the land, this defect is cured by an averment in the answer that defendant is in the actual and exclusive possession of the premises.[10] In an action to enforce a mechanic's lien, brought by one who has furnished materials to a contractor or subcontractor for the erection of a building, it is essential that the petition should contain an averment that the materials were furnished for such building and that they actually went into the building. But an omission of such averment from the petition

[1] Taylor v. Newman, 77 Mo. 257.

[2] Price v. Patrons' Home Prot. Co., 77 App. 236.

[3] Garth v. Caldwell, 72 Mo. 622; Hughes v. Carson, 90 Mo. 399.

[4] Allen v. Chouteau, 102 Mo. 309; Mendenhall v. Leivy, 45 App. 20; Keen v. Munger, 52 App. 660; Whipple v. Peter Cooper B. & L. Ass'n, 55 App. 554.

[5] Grace v. Nesbitt, 109 Mo. 9.

[6] Donaldson v. Butler County, 98 Mo. 163.

[7] Price v. Patrons' Home Prot. Co., 77 App. 236.

[8] Allen v. Chouteau, 102 Mo. 309.

[9] Whipple v. Peter Cooper B. & L. Ass'n, 55 App. 554.

[10] Millington v. Millington, 7 Mo. 446.

is cured by an averment in the answer that the materials were not used in the construction of the building.[1] If, in an action of replevin, the petition omits to state directly that the property is in the possession of defendant, the omission will be cured if the answer confesses that fact, though only by implication.[2] And if the petition fails to show what interest plaintiff has in the property, it is aided by an answer which sets out the plaintiff's interest.[3]

§ 883. A bill was filed to enjoin the foreclosure of a deed of trust given to secure certain notes, upon the ground that the notes were procured by fraud, the notes having been transferred to a bank. There was no allegation in the petition that the bank was not a purchaser of the notes in good faith. But in its answer the bank alleged the purchase of the notes before maturity for full value, and without any notice of the equities asserted by plaintiff. It was held that this averment of the answer supplied any lack of the petition in this respect.[4] If, in an action against A and B on a promissory note, the petition contains no averment that defendants were partners, but the note was signed "A & Co.," a separate answer by B, in which he avers that he was not a partner of A, and denies the execution of the note, is sufficient to supply the defect in the petition.[5]

§ 884. Where plaintiff has released the cause of action, but claims that the release was obtained by fraud, he may, without tendering back what he has received under the release, bring an action setting up the release and allege that it was obtained by fraud, and asking for the difference between the damages to which he is entitled and the amount received under the release. If this issue is not made in the petition, but does appear by the answer and the reply, the irregularity is merely one of form, and will not affect a verdict in accordance with the prayer of the petition.[6] An action was brought against a railroad company for the death of plaintiff's husband, which was alleged to have resulted from the negligence of the employees of the company while operating a train. The petition was defective in not showing what relation the deceased sustained to the railroad company, and therefore in failing to show the measure of defendant's duty to the deceased. But the answer tendered the issue that deceased was not at the

[1] Grace v. Nesbitt, 109 Mo. 9.
[2] Garth v. Caldwell, 72 Mo. 622.
[3] Dillard v. McClure, 64 App. 488.
[4] Henry v. Sneed, 99 Mo. 407.
[5] Stephens v. Frampton, 29 Mo. 263.
[6] Girard v. St. Louis Car Wheel Co., 123 Mo. 358.

time a passenger on the train, and plaintiff by her reply joined in the issue. It was held that the defect of the petition was thus cured.[1]

§ 885. Though the petition fails to allege the performance of a condition precedent, or a sufficient excuse for its non-performance, yet if the answer affirmatively pleads non-performance, and plaintiff takes issue by his reply, the defect in the petition will be helped out by the answer.[2] Thus where the action was on a bond guaranteeing the performance by defendant of a contract to convey lands, the petition was defective in not alleging performance of, or an offer to perform, the contract by plaintiff; the answer, however, alleged that defendant was able, ready and willing to perform the contract, but that plaintiff refused to comply with his part of the agreement and the conditions thereof to be performed by him. The reply denying these allegations, it was held that the issues were properly presented by the pleadings.[3] If the petition in an action for slander based upon a charge of perjury is defective in not stating how the alleged perjury was committed, the defect will be aided by a plea of justification, setting forth the circumstances under which the alleged false oath was taken.[4]

[1] Wagner v. Mo. Pac. R. Co., 97 Mo. 512.

[2] Beckman v. Phœnix Ins. Co., 49 App. 604; Price v. Patrons' Home Prot. Co., 77 App. 236.

[3] Ricketts v. Hart, 150 Mo. 64.

[4] Atteberry v. Powell, 29 Mo. 429.

## CHAPTER XXXVIII.

### DEFECTS CURED BY VERDICT OR BY JUDGMENT.


§ 886. The statute of *jeofails*.
887. Cases applying the statute.
888. Where a demurrer would have lain.
889. Defects cured by default.
890. Defects cured by verdict.
891. Defects cured by verdict cannot be reached by motion in arrest.
892. Construction of pleadings under this rule.
§ 893. Further application of the doctrine.
896. There must be evidence as to the omitted averment.
897. The doctrine applies to a finding by the court.
898. It applies both to answers and replies.
899. Irregularities cured.


**§ 886. The statute of jeofails.**—There are many defects for which a pleading will be condemned if objection is made before the trial, or even during the trial, which will be entirely disregarded if no objection is taken until after a verdict is rendered. The statute, commonly known as the statute of *jeofails*, provides that no verdict shall be stayed, nor any judgment after trial upon confession or by default be reversed, impaired or in any way affected, by reason of the following imperfections, omissions or defects: *First*, for want of a writ; *second*, for any default or defect of process or for misconceiving the process or for awarding the same to the wrong officer; *third*, for any imperfect or insufficient return; *fourth*, for any variance between the writ and the petition; *fifth*, for any mispleading, miscontinuance or discontinuance, insufficient pleading, *jeofail* or misjoining issue; *sixth*, for want of any warrant of attorney, except in case of judgment by confession; *seventh*, for a party under twenty-one having appeared by attorney, if the verdict or judgment is in his favor; *eighth*, for the want of any allegation or averment on account of which omission a demurrer could have been maintained; *ninth*, for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a verdict; *tenth*, for any mistake in the name of a person, or in any sum of money, or in any description of property, or in the date, month or year, when the correct name, sum or description shall

have been once rightly alleged in the proceedings; *eleventh*, for a mistake in the name of a juror or officer; *twelfth*, for the want of a venue, if the cause was tried in the proper county; *thirteenth*, for any informality in entering a judgment or making up the record thereof, or in any continuance or other entry upon the record; *fourteenth*, for any other default or negligence of any clerk or officer of the court, or of the parties, or of their attorneys, by which neither party shall have been prejudiced.[1] The courts are inclined to give this statute a liberal construction, where it can be done without invading substantial rights.[2] The statute cannot, however, come into play as a curative agency unless jurisdiction has attached; it cannot cure a defect in the process or in the service of process, notwithstanding the provisions of the second subdivision of the section.[3] A misnomer of the defendant may be cured by the statute of *jeofails*, where he was actually served and appears by his right name, and makes a defense on the merits.[4] The failure to sign an answer is not matter of substance, but is a defect which is cured by the statute of *jeofails*.[5]

**§ 887. Cases applying the statute.**— In an action on a policy of insurance the petition alleged the execution and delivery of the policy, the description and situation of the property, the payment of the premium, the total destruction of the property by fire, and its value. It further alleged that immediately after the loss plaintiff notified defendant and made proofs of loss, and that plaintiff had duly performed all the terms and conditions of the policy. There was, however, no express allegation that the indemnity claim was due and payable at the time of the commencement of the action. It was held that this fact was clearly inferable from the facts pleaded, and that under the statute of *jeofails* a verdict in favor of plaintiff should not be disturbed.[6] In a suit by an infant, the failure of the petition to allege the appointment of a guardian or next friend to prosecute the suit constitutes an objection which goes merely to the legal capacity of the plaintiff

[1] Rev. Stat. 1899, sec. 672. Robinson v. Mo. Ry. Const. Co., 53 Mo. 435, and Hall v. Lane, 123 Mo. 633, are cases coming within the eighth and ninth subdivisions of the above section. Duncan v. Oliphant, 59 App. 1, is a case under the twelfth subdivision.

[2] Bick v. Wilkerson, 62 App. 31.

[3] Rohrer v. Oder, 124 Mo. 24. It does not cure the failure to join a husband as co-defendant. Latshaw v. McNees, 50 Mo. 381.

[4] State ex rel. v. Burr, 143 Mo. 209.

[5] Cochran v. Thomas, 131 Mo. 258. All the succeeding sections of this chapter treat of matters which come more or less directly within the provisions of the statute of *jeofails*.

[6] Murphy v. North British Ins. Co., 70 App. 78.

to sue, and, if no objection is taken to it before the trial, it is such an imperfection as is cured by the statute of *jeofails*.[1]

§ 888. **Where a demurrer would have lain.**— The provision contained in the eighth subdivision of the above section[2] is one the meaning of which is somewhat obscure. I am not aware of any decisions by the appellate courts of this state which distinctly define the extent to which a failure to demur on the ground that some allegation is omitted, or the overruling of a demurrer which sets up such a ground, will bar the demurrant from raising the question at a subsequent stage of the case. As has been shown in the preceding two chapters, the lack of a non-essential averment may be waived, and such lack may be cured by verdict.[3] It is a reasonable interpretation of the language used in the subdivision in question that it goes only to that extent.[4] One thing is settled beyond a doubt, and that is that the clause under discussion cannot refer to a total failure to state a cause of action. For, by the express provisions of the statute[5] and in accordance with the entire current of authority in this state, such total failure to set forth a cause of action is never waived and cannot be cured, but may be taken advantage of though it be raised for the first time in the appellate court. But, as is said by Sherwood, J., in *Pomeroy v. Benton*,[6] "if the substantial averments are there, and the adversary overlooks mere formal defects, his statutory right to indulge in critical objections is swallowed up in his statutory waiver; thenceforward he must address himself to the merits of the case."[7]

§ 889. **Defects cured by default.**— If a judgment is rendered by default it will not be reversed, impaired or in any way affected by reason of the omission of an allegation on account of which a demurrer would lie, if the petition states a cause of action.[8] Where there are several counts in the petition and one is substantially defective, the statute does not reach it, and the defect is not cured by default.[9]

[1] Lyddon v. Dose, 81 App. 64.

[2] Rev. Stat. 1899, sec. 672; see § 886, *ante*.

[3] Murphy v. North British Ins. Co., 70 App. 78, 83.

[4] This view is strengthened by the decisions which are collected in the chapter on "The Demurrer" (ch. XXXII), and by the decision of the court of appeals in Graham v. Allison, 24 App. 516, 525. See the two succeeding sections.

[5] Rev. Stat. 1899, sec. 602.

[6] 57 Mo. 531.

[7] 57 Mo., p. 550. See also Garner v. McCullough, 48 Mo. 318; Saulsbury v. Alexander, 50 Mo. 142.

[8] Robinson v. Mo. Ry. Const. Co., 53 Mo. 435.

[9] Neidenberger v. Campbell, 11 Mo. 359. See § 890, n. 3.

**§ 890. Defects cured by verdict.**— The ninth subdivision of section 672[1] provides for the curing of a defect in pleading by the verdict, including, as we shall see, the finding of a court. Under this subdivision a verdict is not to be stayed nor a judgment affected or impaired for the omission in a pleading of any allegation or averment without proving which the triers of the issues ought not to have given such a verdict. The rule that certain errors and defects in pleading may be cured by the verdict or by the judgment is not a new one, and was not introduced by the Code. The rule of the common law was that where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict, then the want of stating that matter in express terms was cured by the verdict, provided the declaration contained terms sufficiently general to comprehend the omitted averment in fair and reasonable intendment. And a like rule prevails under the Code.[2] But at common law, and the rule is substantially the same under the code practice, the verdict did not cure the lack of an averment of a substantial constitutive fact.[3] Thus, in an action of covenant, a failure to allege with whom the covenant was made, and to allege a performance of conditions precedent, was not cured by a judgment by default.[3] For, in order that the defects of statement shall be cured by the verdict, the petition must state a cause of action.[4] A failure to state facts sufficient to constitute a cause of action is radical and incurable.[5] Moreover, if the fact which the plaintiff fails to aver is one of the essential or constituent elements of the cause of action, the verdict does not cure the defect,[6] since it is only where a material averment is defectively stated, and not where it is wholly omitted, that the defect is cured by verdict.[7] But if the petition impliedly states a cause of action, and it is not attacked by a demurrer or a motion to make definite, it will be held good after verdict.[8] So, too, if it is not essentially defective, and the de-

[1] § 886, *ante*.

[2] International Bank v. Franklin County, 65 Mo. 105; Salmon Falls Bank v. Leyser, 116 Mo. 51.

[3] Keatty v. McLaugherty, 4 Mo. 221.

[4] Crone v. Mallinckrodt, 9 App. 316; Pry v. Han. & St. J. R. Co., 73 Mo. 123; Lingenfelter v. Phœnix Ins. Co., 19 App. 252; Mace v. Vendig, 23 App. 253.

[5] Weil v. Greene County, 69 Mo. 281; Clark v. Whittaker Iron Co., 9 App. 446.

[6] Staley House Furn. Co. v. Wallace, 21 App. 128; Story v. Amer. Cent. Ins. Co., 61 App. 534; Freymark v. McKinney Bread Co., 55 App. 435.

[7] Frazer v. Roberts, 32 Mo. 457; Wells v. Covenant Mut. Ass'n, 126 Mo. 630.

[8] Munford v. Keet, 65 App. 502.

fective statement of the essential allegations is supplemented by the admissions of the answer, the petition is sufficient after verdict.[1] In every case of a mere defective statement of essential facts, if it appears after verdict that the verdict could not have been given, or the judgment rendered, without proof of the matter omitted, the verdict will cure the defect.[2]

§ 891. **Defects cured by verdict cannot be reached by motion in arrest.**— Such defects as are cured by the verdict cannot be reached by a motion in arrest of judgment.[3]

§ 892. **Construction of pleadings under this rule.**— Whatever may be the rule as to the construction of pleadings when the attention of the court is called to them before the trial, they will certainly not be construed most strongly against the pleader if they are not attacked until after the verdict.[4] For in such case a plea to the merits waives the objection.[5] Thus, an objection that the petition contains redundant and immaterial matter comes too late after the verdict.[6]

§ 893. **Further application of the doctrine.**— The doctrine of aider by verdict applies to cases where that which ought to be explicitly stated is not so stated, but may be gathered from other allegations contained in the pleading,[7] the rule being that if the facts requisite to constitute a cause of action are necessarily inferable from the pleading taken in its entirety, though informally stated, the petition will be held good after verdict.[8] Mere imperfections or indefiniteness in the statement are not open to review unless attacked before the verdict is rendered.[9] The ground of this rule, that, where a material allegation is not expressly averred, but is necessarily implied from the words stated, the defect is cured by the verdict, is that it will be presumed that plaintiff proved the fact thus imperfectly alleged and the existence of which was necessary to a recovery by him.[10]

[1] Krum v. Jones, 25 App. 71. See § 881, *ante*.

[2] State v. Sullivan County Court, 51 Mo. 522, 529.

[3] Carrington v. Hancock, 23 App. 299.

[4] Oglesby v. Mo. Pac. R. Co., 150 Mo. 137.

[5] Malone v. Fidelity & Casualty Co., 71 App. 1.

[6] Bradley v. Chicago, M. & St. P. R. Co., 138 Mo. 293.

[7] Peck v. Bridwell, 10 App. 524.

[8] State ex rel. v. Pace, 34 App. 458; Edmonson v. Phillips, 73 Mo. 57; Grove v. Kansas City, 75 Mo. 672; State ex rel. v. Williams, 77 Mo. 463; Young v. Powell, 13 App. 593; Buck v. People's Ry. Co., 46 App. 555.

[9] Green v. Supreme Lodge, 79 App. 179.

[10] Bowie v. Kansas City, 51 Mo. 454; Hamlin v. Carruthers, 19 App. 567; Enterprise Coal Co. v. Liberty Brew-

The rule, however, applies only to defective allegations of a material fact; and an entire failure to set out the constitutive, indispensable elements of a cause of action are not so cured.[1] For where the petition totally omits to state a cause of action, there is no room for the presumption that plaintiff proved the fact.[2] Where two distinct grounds of liability are set forth in a petition in one count, and the allegations are totally insufficient to state a cause of action on the one ground, and the allegations as to the other ground are defective, a verdict will not cure the defect.[3] Where the action was brought for a balance claimed to be due plaintiff for his commissions upon a purchase of hogs for the defendant, and for moneys expended and expenses incurred in connection therewith, there was a verdict for plaintiff for five hundred dollars. It was evident from the record that all the issues were found for defendant except in regard to a five hundred dollar draft, for which plaintiff claimed credit. There were no facts alleged in the petition showing defendant's liability on account of the draft, and the evidence did not disclose such liability. It was held that the petition was so fatally defective that it was not cured by verdict.[4]

§ 894. Where the petition does not fail altogether to state a cause of action, but it is only formally defective, the defect cannot be reached by interposing at the trial an objection to the introduction of any evidence.[5] Where the plaintiff sues for work done and cash furnished, but omits to say "by the plaintiff," the defect is cured by verdict.[6] So is the failure to formally allege in the body of the petition the copartnership of plaintiffs, if it is set out in the caption.[7]

§ 895. The courts sometimes go to a great length to support a verdict and judgment, even though the pleading is exceedingly defective. A striking illustration of this is found in the case of *Hirsch v. United States Grand Lodge*,[8] in which the court uses the following language: "Instead of stating the substantive facts that the plaintiff made a contract with the defendant au-

ing Co., 20 App. 16; Hurst v. Ash Grove, 96 Mo. 168; People's Bank v. Scalzo, 127 Mo. 164.

[1] Shaver v. Mercantile Ins. Co., 79 App. 420.

[2] Berthold v. Clay Fire Ins. Co., 2 App. 311. See also Summers v. Home Ins. Co., 53 App. 520.

[3] Byington v. St. Louis R. Co., 147 Mo. 673.

[4] Falls v. Daily, 74 Mo. 74.

[5] Hurst v. Ash Grove, 96 Mo. 168; Clark v. Fairley, 24 App. 429.

[6] Saulsbury v. Alexander, 50 Mo. 142.

[7] Richardson v. Farmer. 36 Mo. 35.

[8] 56 App. 101.

thorized by its laws, and what such laws were on the controverted question, it states that the defendant induced the plaintiff to enter into a contract by representing what its laws were on the controverted point. It states that the defendant refused to pay the claim because its laws prohibited such payment, but neither admits nor denies the existence of such prohibitory law. It is evident that the pleader did not desire on the one hand to admit the validity of the adoption of the amendment of 1888, nor did he on the other hand intend to forego the benefit of a positive estoppel, in case it should be determined that such law was validly adopted. As the petition does, however, at least by intendment, show a contract between the plaintiff and defendant, and a right of recovery thereon independent of any question of estoppel, we think a general demurrer thereto was properly overruled. To reach the defects of the petition a motion to make it more definite and certain was the proper remedy." (p. 103.)

§ 896. **There must be evidence as to the omitted averment** — A party cannot invoke the rule of aider by verdict if he offers no evidence whatever touching the point as to which the rule is invoked.[1]

§ 897. **The doctrine applies to a finding by the court.**— The rules above stated apply as well to a trial and finding by the court as to a verdict by the jury.[2]

§ 898. **It applies both to answers and replies.**— That a verdict in favor of defendant may also cure an imperfect answer is held in the following cases. It is settled that a plea of accord and satisfaction must contain an allegation that the thing tendered by the debtor was received by the creditor in full satisfaction of the debt; yet if this allegation is omitted, but the verdict is in favor of the defendant, the defect is cured.[3] So, in an action of slander, plaintiff cannot object after the trial that a plea of justification is insufficient, since, however insufficient it may be, defendant will be entitled to a verdict if it is proved; the defect, therefore, is cured by the verdict.[4] Though a motion might properly lie to make an answer definite and certain, yet if the meaning of the pleader is unmistakable, it will be sufficient after verdict.[5] And it is too late after verdict to object that the

[1] Summers v. Home Ins. Co., 53 App. 521.

[2] Bassett v. Western Union Tel. Co., 48 App. 566.

[3] Wilkerson v. Bruce, 37 App. 156.

[4] Evans v. Franklin, 26 Mo. 252.

[5] Hay v. Short, 49 Mo. 139.

answer sets up inconsistent defenses.[1] It has also been held that a defective replication may be cured by verdict.[2]

**§ 899. Irregularities cured.**—If the petition is irregular in setting out the same matter in three separate counts, but defendant fails to move that plaintiff be confined to one count, such irregularity is cured by verdict.[3] A variance between the declaration and the instrument sued on in the date of the instrument is cured by verdict.[4] Though a plea in abatement in an attachment proceeding may be defective, yet if the plaintiff in the attachment goes to trial on it, and treats it as putting in issue the truth of the facts alleged in the attachment affidavit, it will be held good after verdict.[5] It is too late after verdict for defendant to raise the objection that the reply was not filed within the prescribed time.[6]

The question whether an imperfect petition is cured by a verdict in favor of plaintiff has come before our courts in a variety of cases, and the decisions in these cases are useful as guides in determining whether any specific case comes within the rule. A collection of these cases will be found in the next chapter.

[1] Schaefer v. Causey, 8 App. 142.
[2] Davis v. Cooper, 6 Mo. 148.
[3] Price v. Whiteley, 50 Mo. 439.
[4] Warne v. Anderson, 7 Mo. 46.
[5] Bailey v. O'Bannon, 28 App. 39.
[6] Magehan v. Orme, 7 Mo. 4.

## CHAPTER XXXIX.

### SPECIFIC CASES IN WHICH THE DEFECTS HAVE BEEN HELD TO BE CURED BY THE VERDICT OR JUDGMENT.


§ 900. In miscellaneous proceedings.
901. Clerical mistakes.
902. Question of license.
903. In suit to construe a will.
904. Pleading notice.
905. Stating value.
906. Stating ownership.
907. General charge of negligence or fraud.
908. Action for assault.
909. In *assumpsit*.
910. Action on a bill or note.
911. On bond.
912. Against carriers.
913. On contract.
914. On contract of marriage.
915. Action for contribution.
916. Action against county.
917. Action for breach of covenant.
918. Action for fraud.
§ 919. Actions on insurance policies.
921. Same — Averment of ownership.
922. Same — Averments showing that amount is due.
923. Same — Against benefit association.
924. Action for malicious attachment.
925. Action on mechanic's lien.
926. Foreclosing mortgage.
927. Actions by municipalities.
928. Actions based on negligence.
929. Actions against railroad companies.
930. Replevin suits.
931. Actions for slander.
932. Suit for specific performance.
933. Actions for delinquent taxes.


§ 900. **In miscellaneous proceedings.**— In an action for conversion the petition will not be adjudged insufficient after verdict because it fails to allege that the conversion was wrongful.[1] And if the petition fails to set out the value of the articles converted, but refers to an exhibit for their description and value, the defect is cured by verdict.[2] Where there are two counts in the petition, and plaintiff sues in one in a representative capacity, and in the other in his individual capacity, it was held under the former practice that the misjoinder was cured by verdict.[3] Whether in view of the language of the seventh subdivision of section 593,[4] taken in connection with the last clause of that section, it would be so held under the present practice, is doubtful.[5] There is no doubt,

[1] McDonald v. Mangold, 61 App. 291.
[2] Case v. Fogg, 46 Mo. 44.
[3] Yates v. Kimmel, 5 Mo. 87.
[4] Rev. Stat. 1899.
[5] The seventh subdivision makes as a class by itself "claims by or against a party in some representative or fiduciary capacity, by virtue of a contract

however, that if causes of the same class are blended in the same count of the petition, and defendant neglects to take advantage of the irregularity by a motion to compel plaintiff to elect, the defect is cured by verdict.[1] Even if the petition is defective by reason of the fact that it fails to use words in stating amounts of money, but instead of words employs arabic figures preceded by the dollar sign, and with the last two figures cut off by a dot to indicate cents, such a defect is nevertheless cured by verdict.[2]

§ **901. Clerical mistakes.**— In an action by an employee to recover for injuries resulting from unsafe appliances furnished by the employer, the petition alleged that the said defendant, wholly disregarding its duty to this "defendant," did furnish, etc.; it being apparent that the second use of the word "defendant" was a clerical mistake, the defect is cured by the verdict.[3]

§ **902. Question of license.**— Where the action was to recover attorney's fees, and the petition failed to directly allege that plaintiff had obtained a license to practice law, the defect could not be taken advantage of after the verdict, especially where the allegation is inferentially made that plaintiff had been duly admitted to the bar.[4]

§ **903. In suit to construe a will.**— In a suit to construe a will, if the petition fails to set out *in hæc verba* the will which is to be construed, or the terms and provisions of the will as a whole, but does set out substantially that part of the will the construction of which is desired, and so clearly states that part as to enable the court to ascertain its purport and meaning, the petition will be held good after judgment, as the presumption will be indulged that this is the only clause bearing on the issue.[5]

§ **904. Pleading notice.**— In a proceeding to foreclose a mortgage which defectively described the mortgaged land, the petition charged that the defendant, who had purchased by *mesne* conveyances the mortgaged property, had notice of the mistake in the mortgage, but it omitted to allege that the defendant's immediate vendor had such notice; yet it was held that, notwithstanding this defect, the judgment would not be disturbed.[6] In an

or by operation of law." The last clause of the section provides that the causes of action which are united must all belong to one of the specified classes.

[1] Brown v. Kansas City, St. J. & C. B. R. Co., 20 App. 427; Welsh v. Stewart, 31 App. 376.

[2] Fulenwider v. Fulenwider, 53 Mo. 439.

As to omission to allege **incorporation**, see § 927, *post*.

[3] Johnson v. Mo. Pac. R. Co., 96 Mo. 340.

[4] Kersey v. Garton, 77 Mo. 645.

[5] Graham v. Allison, 24 App. 516.

[6] Knox County v. Brown, 103 Mo. 223.

action against a municipal corporation for damages arising out of an injury incurred while walking on the sidewalk of one of the principal streets of the city, the charge being that an opening in the sidewalk was carelessly and negligently left open and unguarded by the city, the averment is sufficiently implied that defendant was bound to keep the sidewalk in repair and that it had notice of the dangerous condition of the same, so that the want of such a specific averment was cured by verdict.[1] So, too, in an action against a city for personal injuries caused by an obstruction in a street, the petition alleged that defendant failed and neglected to keep the street in a safe and suitable condition for the use of the public, and unlawfully and negligently suffered the street to be obstructed. This was held to state facts from which it might be inferred that defendant had notice of the dangerous condition of the street, and though the petition is defective it was held good after verdict.[2]

§ **905. Stating value.**—It is doubtful under all the authorities whether the stating of the value in ordinary actions at law is a material averment, but, at all events, a failure in an action against a sheriff for an unlawful levy and sale to state in the petition the value of the property taken, if a defect at all, is one of such a formal kind as to be cured by the verdict.[3] But in actions on fire insurance policies the statement of the value of the property destroyed is essential, and the failure to allege the value in express terms, or in terms from which the value can be clearly inferred, is a fatal defect.[4]

§ **906. Stating ownership.**—Where in an action to enforce a mechanic's lien it was alleged that defendant and a third person are and were the owners of the property, and that defendant contracted with the plaintiffs on behalf of himself and his co-owner, this amounted by necessary intendment to an allegation of ownership in the defendant at the date of the contract.[5] Since in an action on a fire insurance policy the petition must state the ownership of the insured property by plaintiff at the time of the fire, an averment that plaintiff owned the business conducted in the building containing the property is not sufficient, and the want of the necessary allegation is not cured by verdict.[6]

[1] Bowie v. Kansas City, 51 Mo. 454.

[2] Hurst v. Ash Grove, 96 Mo. 168. For rule as to notice in mechanics' lien cases, see § 925, *post*.

[3] State ex rel. v. Beamer, 73 Mo. 37. See also § 925, *post*, n. 3.

[4] Story v. Amer. Cent. Ins. Co., 61 App. 534. See § 919, *post*.

[5] Van Riper v. Morton, 61 App. 440.

[6] Story v. Amer. Cent. Ins. Co., 61 App. 534.

**§ 907. General charge of negligence or fraud.**— A general allegation of negligence is good after verdict.[1] And a general plea of contributory negligence is good after verdict, even though it was shown that defendant was negligent.[2] A pleading which is defective in not alleging specific acts of fraud is sufficient after a verdict or a finding of fraud.[3]

**§ 908. Action for assault.**— A petition in an action for an assault and battery, which does not charge that the assault was wrongful, but does charge that it was with force and arms, is good after verdict.[4]

**§ 909. In assumpsit.**— It is held by our courts, following the rule of the common law, that in actions of *assumpsit* the petition must allege a promise; but the omission of this allegation is cured by verdict.[5]

**§ 910. On a bill or note.**— The rule which obtains in actions of *assumpsit*, that the failure by plaintiff to allege a promise is cured by verdict, applies also to actions on bills of exchange or promissory notes. Thus, if it is not alleged that the defendant promised to pay, but only that he put his name upon the back of the note before delivery, this is good after verdict, especially where it appears from the averments of the answer that the defendant knew he was charged as joint maker.[6] An allegation that payment was refused charges by implication that a demand of payment was made; and an allegation that a note was protested and due notice was given involves an allegation that notice of non-payment was given.[7]

**§ 911. On bond.**— Where in an action upon an attachment bond there is no allegation that the state sues, but the petition sets forth by sufficient averments the title of the person for whose benefit the bond was made and who is the real party in interest, and all the facts entitling such person to recover, the petition is good after verdict.[8]

**§ 912. Against carrier.**— If the petition contains facts sufficient to fix the common-law liability of the carrier, it is good after verdict.[9] Thus an allegation of a contract to carry,

[1] Daugherty v. Mo. Pac. R. Co., 9 App. 478; affirmed, 81 Mo. 325; Lachner v. Adams Exp. Co., 72 App. 13.

[2] Lien v. Chicago, M. & St. P. R. Co., 79 App. 475.

[3] Wilcoxson v. Darr, 139 Mo. 660. See also §§ 918 and 928, *post*.

[4] McKee v. Calvert, 80 Mo. 348.

[5] Cape Girardeau & State Line R. Co. v. Kimmel, 58 Mo. 83. See in this connection §§ 343–345, *ante*.

[6] Grelle v. Loxen, 7 App. 97.

[7] Shaler v. Van Wormer, 33 Mo. 386.

[8] State to use v. Webster, 53 Mo. 135.

[9] Austin v. St. Louis & St. Paul Packet Co., 15 App. 197.

coupled with an averment that defendant is a railroad corporation, is sufficient.[1] If the action is one to recover for injuries, an averment that the sudden starting of the car while plaintiff was in the act of alighting occurred through the negligence of defendant's servants carries the implication that the conductor saw plaintiff, or would have seen her if he had been attending to his business, and the petition is good after verdict.[2]

§ 913. **Action on contract.**— The omission to set out the facts which constitute the consideration, being a defect which might have been reached by demurrer, is cured by the verdict.[3] So, too, a defective statement of the performance of the contract by the plaintiff is cured by verdict.[4]

§ 914. **On contract of marriage.**— Where the action is for a breach of a promise of marriage, and the petition alleged that at the request of defendant the plaintiff had promised to marry her, and that defendant, not regarding his said promise, had married another, but it did not aver a promise of defendant to marry plaintiff, the petition was nevertheless good after verdict, since the words "the defendant, not regarding his said promise," by implication alleged a promise by defendant to marry the plaintiff.[5]

§ 915. **Action for contribution.**— Where an action was brought by one surety against his co-surety to compel contribution, an averment in the petition that plaintiff had compromised, settled and fully discharged the debt, without stating the specific amount which he had paid, was held good after verdict, though the facts were not stated with such particularity as they should have been.[6] And where the parties were co-sureties on a guardian's bond, and plaintiff had paid the judgment rendered in an action on such bond, a failure to state in the petition that the original suit on the guardian's bond was brought in the name of the state to the use of the beneficiaries will not vitiate the judgment, since such an error is cured by verdict.[7]

§ 916. **Action against county.**— If in an action on a county warrant the petition fails to state that there were funds in the

[1] Kain v. Kansas City, St. J. & C. B. R. Co., 29 App. 53.

[2] Cobb v. Lindell R. Co., 149 Mo. 135.

[3] Kercheval v. King, 44 Mo. 401.

[4] O'Conner v. Standard Theater Co., 17 Mo. 675. A case where a petition in a suit for specific performance of a contract was held good after a decree will be found in § 932, *post.*

[5] Roper v. Clay, 18 Mo. 383. A petition which was held good after verdict will be found in Davis v. Slagle, 27 Mo. 600.

[6] Kincaid v. Yates, 63 Mo. 45.

[7] Haygood v. McKoon, 49 Mo. 77.

treasury out of which the warrant might have been paid, and that the treasurer refused to pay such warrant out of those funds, the defect is cured by verdict, and the omission will be supplied by the court.[1]

§ 917. **Action for breach of covenant.**— In an action upon the covenants of a deed, the petition alleged that the plaintiff's evictors "by their paramount title in fee simple" recovered judgment against the plaintiff. It appearing on the trial that at the time the deed was made the adverse title was paramount to that derived from the covenantor, this allegation was held to be good after the verdict.[2]

§ 918. **For fraud.**— In an action for deceit a petition which states that the representations were made by the defendant, and that when made they were known by him to be false, fraudulent, deceitful and untrue, states an intent to deceive with such certainty as to make it good after verdict.[3] Though an answer pleading fraud may be defective in not alleging the specific acts constituting the fraud, yet it may be sufficient to support a finding of fraud, where the objection was not made until the motion in arrest, and the adverse party was not misled.[4]

§ 919. **Actions on insurance policies.**— Where in an action on a fire insurance policy the petition fails to state the amount of the premium paid, this is at most an imperfection which is cured by verdict.[5] If the petition fails to allege, either directly or inferentially, the amount of the insurance, or that plaintiff was insured in any amount, or that he was to be reimbursed in money or other things, it is fatally defective, even after verdict.[6] The value of the property insured is a constitutive fact, which must be alleged and proven; and the doctrine of aider by verdict cannot be invoked to supply the lack of such an averment.[7] The allegation of a petition was that defendant insured plaintiff to the amount of $1,200 on certain property described, and that the property was totally destroyed by fire. These averments of value and loss were held sufficient after verdict.[8]

[1] Howell v. Reynolds County, 51 Mo. 154.

[2] Collins v. Baker, 6 App. 588.

[3] Rannells v. Hewitt, 10 App. 593.

[4] Wilcoxson v. Darr, 139 Mo. 660.

[5] Summers v. Home Ins. Co., 56 App. 653.

[6] Wittkowsky v. Amer. Ins. Co., 79 App. 501.

[7] Coleman v. Phœnix Ins. Co., 69 App. 566; Sappington v. St. Joseph Mut. F. Ins. Co., 72 App. 74; Wright v. Bankers' Mut. F. Ins. Co., 73 App. 365; Jones v. Philadelphia Underwriters, 78 App. 296.

[8] Jones v. St. Joseph F. & M. Ins. Co., 55 Mo. 342.

§ 920. An insurance policy was assigned by the insured as collateral security to secure a debt less than the amount of the insurance. In an action upon the policy, plaintiff alleged its issue, etc., and also the fact of such pledge. He then alleged that the defendant had paid to the pledgee the amount which plaintiff owed the latter, but refused to pay to plaintiff the balance due on said policy. In the appellate court defendant raised the objection that there was no allegation that the policy had been re-assigned to the plaintiff, or that the assignee had fraudulently adjusted the loss with the defendant. But it was held that the petition by necessary implication showed that only a part of the amount due on the policy was to be paid to the pledgee, and that such amount only had been paid, and that, therefore, by necessary inference the balance was due to the plaintiff, and that the defect in the petition was cured by verdict.[1]

§ 921. **Same — Averment of ownership.** — If the petition fails to allege that plaintiff was the owner of the property insured, both at the time of its insurance and at the time of the loss, the defect is not cured by verdict.[2] Allegations that the plaintiff owned the business conducted in the building containing the property, and that he was damaged in a stated amount by the destruction of the property, will not suffice, these not being the equivalent by necessary intendment of the requisite averments.[3] But where plaintiff alleges that the insurance was taken on "his" stock of general merchandise, the petition is sufficient after verdict, though the court says that this is a defective averment of ownership.[4] Where the description of the property insured contained in the petition was in the following words: "on his barn and sheds adjoining," and it is accompanied with an enumeration of the grain in the barn and crib, and the petition sets out the amount of insurance apportioned to each, this is a sufficient allegation of plaintiff's ownership to support the verdict.[5] If the policy is a valued one, and the language of the petition clearly

[1] Summers v. Home Ins. Co., 56 App. 653.

[2] Story v. Amer. Cent. Ins. Co., 61 App. 534; Clevinger v. Northwestern Ins. Co., 71 App. 73; Jones v. Philadelphia Underwriters, 78 App. 296.

[3] Story v. Amer. Cent. Ins. Co., 61 App. 534.

[4] Boulware v. Farmers' Co-op. Ins. Co., 77 App. 639; Shaver v. Mercantile Ins. Co., 79 App. 420. The intimation to the contrary in Clevinger v. Northwestern Ins. Co., 71 App. 73, must be deemed to be overruled.

[5] Bondurant v. German Ins. Co., 73 App. 477.

indicates ownership, or the allegation is one from which ownership is reasonably inferable, the petition will be held good after verdict.[1] An allegation that plaintiff had an insurable interest in the property as the owner thereof is at least an inferential averment of ownership and is sufficient after verdict.[2]

**§ 922. Same — Averments showing that amount is due.**— A petition is fatally defective which fails to state that the insurance was for a definite period, which extends beyond the date of the loss.[3] So is a petition which does not allege, either directly or inferentially, that the amount of the policy was due at the time of the institution of the action.[4] But if the petition alleges the execution and delivery of the policy, the description and situation of the property, the payment of the premium, the total destruction by fire of the property and its value, the notification and proof of loss, and then adds that plaintiff had duly performed all the terms and conditions of the policy and defendant had refused to pay the loss, though the same had been demanded, this clearly implies that the amount of the policy was due and payable at the time the action was commenced.[5]

**§ 923. Same — Against benefit association.**— Where a certificate of membership in a benefit association had been surrendered by the deceased, and from the time of the surrender he had failed to pay the premiums, and the petition did not set out any excuse for such failure, and did not aver a willingness on the part of the plaintiff to pay all unpaid premiums, these were fatal defects, which a verdict would not cure.[6]

**§ 924. Action for malicious attachment.**— In an action for malicious attachment it is essential to show that the attachment proceedings had terminated in favor of the defendant, and the want of such an averment in the petition is not cured by verdict.[7]

**§ 925. On mechanic's lien.**— Where it can be gathered from the petition that the dwellings against which the lien was filed constituted one building erected under one contract, though there

[1] Jones v. Philadelphia Underwriters, 78 App. 296; Cagle v. Chillicothe F. Ins. Co., 78 App. 431.

[2] Jones v. Philadelphia Underwriters, 78 App. 296; Cagle v. Insurance Co., 78 App. 431. This is unquestionably a direct averment of an insurable interest in plaintiff.

[3] Shaver v. Mercantile Ins. Co., 79 App. 420.

[4] Wright v. Bankers' Mut. Ins. Co., 73 App. 365; Shaver v. Mercantile Ins. Co., 79 App. 420. The same ruling is made in an action on a promissory note in Spears v. Bond, 79 Mo. 467.

[5] Murphy v. North British Ins. Co., 70 App. 78.

[6] Wells v. Covenant Mut. Ben. Ass'n, 126 Mo. 630.

[7] Freymark v. McKinney Bread Co., 55 App. 435.

is no explicit statement of this fact in the petition, the petition will be held sufficient after verdict.[1] If the action is brought by a subcontractor, and the petition alleges generally that one defendant was owner and the other the original contractor, it may fairly be assumed that the original contract was with the owner, and if the petition is defective in this regard it will nevertheless sustain a verdict for the plaintiff and establishing the lien.[2] Any insufficiency of the allegations as to notice, or that the materials were worth the prices charged, is cured by verdict, if full proof is made of such facts.[3] But where the petition alleges that on a certain day plaintiff filed a "notice of lien claimed on said premises for the indebtedness aforesaid, which notice was duly verified, and specified the amount of the claim as above stated, and specified the defendant S. as the owner of said premises, which were therein fully described," this is not a substantial compliance with the statute, and the defect is not cured by verdict.[4] Where the petition alleged that the items of the account were furnished between the 6th and 17th of September, on which last day the account accrued, this will be held, after verdict, to state that the last item was furnished on the 17th of September.[5] Where the petition stated that the defendant and a third person are and were the owners of the property, and that the defendant contracted with the plaintiffs on the part of himself and his co-owner, this by necessary intendment amounted to an allegation of ownership in the defendant at the date of the contract.[6]

§ 926. **Foreclosing mortgage.**— In a proceeding to foreclose a mortgage which defectively described the land, the petition charged the defendant, who was a subsequent purchaser from the mortgagor, with notice of the misdescription, but failed to alleged that defendant's immediate vendor had such knowledge, yet it was held that the petition was good after verdict.[7]

§ 927. **Actions by municipalities.**— In an action by a municipal corporation on a tax-bill, a failure to allege that the plaintiff is a corporation and that it had authority to levy taxes, or a failure to make either of these allegations, renders the petition fatally defective, and the defects are not cured by verdict.[8]

[1] Peck v. Bridwell, 10 App. 524.

[2] Cole v. Barron, 8 App. 509.

[3] Gibson v. Nagel, 15 App. 597.

[4] Fay v. Adams, 8 App. 566. This case is not reported in full.

[5] Peck v. Bridwell, 10 App. 524.

[6] Van Riper v. Morton, 61 App. 440.

[7] Knox County v. Brown, 103 Mo. 223.

[8] Clinton v. Williams, 53 Mo. 141.

For cases involving the question of a proper statement of notice to a municipal corporation, see § 904, *ante*.

**§ 928. Actions based on negligence.**— If, in an action based on negligence, the petition alleges two acts, each of which is charged to constitute negligence, if one of such acts is not negligence of a nature such as would make the defendant legally liable, yet, if defendant waits until after verdict before objecting to it, his objection will not be heard, if by a liberal construction of the petition it can be held sufficient to sustain the verdict.[1]

**§ 929. Actions against railroad companies.**— Where the action is for double damages for killing a cow, and the complaint alleges that the cow without plaintiff's fault strayed upon defendant's track at a point where it ran through and along cultivated lands, and where it was not sufficiently or lawfully fenced and guarded by cattle-guards, and where there was no public crossing, it is good after verdict, though it is not expressly alleged that the cow got upon the track by reason of the failure to fence.[2] So, if the complaint alleges the killing in an "adjacent," instead of an "adjoining," township, the error is cured by verdict.[3] In an action brought under the statute [4] against a railroad company for setting fire, it is not fatal to the verdict that there was no attempt to prove negligence on the part of defendant, even though the petition alleges it; notwithstanding such allegation, if the averments of the petition are sufficient to bring the case within the statute, a recovery will be upheld.[5]

**§ 930. Replevin suits.**— The omission to aver directly that the property claimed is in the possession of defendant will be cured by verdict, if the petition alleges that the defendant wrongfully detains the property; and the same result follows if the answer confesses that fact, though only by implication.[6]

**§ 931. Actions for slander.**— Where the petition alleges that defendant charged plaintiff with swearing falsely in a proceeding before a justice of the peace, but there is no allegation that

[1] Oglesby v. Mo. Pac. R. Co., 150 Mo. 137. That a petition containing only a general charge of negligence will be sustained after verdict, see § 907, *ante*.

[2] Edwards v. Kansas City, St. J. & C. B. R. Co., 74 Mo. 117.

[3] Harrison v. St. Louis, I. M. & S. R. Co., 58 App. 463. Both the foregoing cases were originally brought before a justice, but I cite them here because I think the rulings would equally apply to a petition filed in a court of record.

[4] Rev. Stat. 1899, sec. 1111.

[5] Fields v. Wabash R. Co., 80 App. 603.

[6] Garth v. Caldwell, 72 Mo. 622. And it is decided in the same case that even if it were necessary, in an action to replevy corn in the stock, to allege that the corn had matured, yet a failure to make such averment cannot be taken advantage of after verdict.

the justice had jurisdiction of the proceeding, or that he had power to administer the oath, or that the testimony was as to a material matter, the petition is nevertheless good after verdict.[1]

§ 932. **Suit for specific performance.**— Where the suit is one for a specific performance, if the facts are specially found by the court or by the jury, and such special findings are sufficient to support the decree, it will not be reversed because the contract is defectively stated in the petition.[2]

§ 933. **Actions for delinquent taxes.**— In an action by a municipal corporation on a tax-bill, a failure to allege that the plaintiff is a corporation, and that it had authority to levy taxes, or a failure to make either of these allegations, renders the petition fatally defective, and it is not cured by verdict.[3]

[1] Palmer v. Hunter, 8 Mo. 512; Harris v. Woody, 9 Mo. 113.

[2] Despain v. Carter, 21 Mo. 331.

[3] Clinton v. Williams, 53 Mo. 141.

For cases involving the question of a proper statement of notice to a municipal corporation, see § 904, *ante*.

## CHAPTER XL.

### AMENDING PLEADINGS.


§ 934. The allowance of amendments is discretionary.
935. Rules for the guidance of the court.
936. When leave to amend may be refused.
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**§ 934. The allowance of amendments is discretionary.**— The allowance of amendments is uniformly held to be discretionary.[1] Except under the circumstances mentioned in section 985, *post*, they are not allowed as a matter of course.[2] And the trial court does not abuse its discretion in refusing plaintiff leave to file at the trial an amended petition, where the proposed amendment is immaterial.[3] But when it is said that the granting of an amendment is discretionary with the court, it does not mean that that discretion is not subject to review; for the appellate court will always look to see whether or not the trial court has abused its discretion.[4]

**§ 935. Rules for the guidance of the court.**— Courts should so construe the sections of the statute authorizing amendments as to discourage negligence and deceit, to prevent delay, and to

[1] Henderson v. Henderson, 54 Mo. 534; Ensworth v. Barton, 67 Mo. 622; Turner v. Thomas, 10 App. 338; Brinkman v. Luhrs, 60 App. 512.

[2] Caldwell v. McKee, 8 Mo. 334.

[3] Steinhauser v. Spraul, 114 Mo. 551.

[4] Joyce v. Growney, 154 Mo. 253.

secure the parties from being misled.[1] If it is apparent that the refusal of leave to amend may lead to the perpetration of injustice under the forms of law, and that the granting of the amendment on proper terms will work no wrong, the amendment should be allowed; especially so where, from the character of the original pleading and of the proposed amendment, it is apparent that the party intended to raise by his first pleading the issue which he tenders by the amended pleading.[2] In the case cited defendant was sued individually upon a note signed by him as president of a corporation, and his answer was a general denial. Under the general denial he offered to show that the note was not his personal obligation, but that of the corporation of which he was president, and that it was given as a debt of the corporation to plaintiff, which evidence was properly excluded under the general denial, but it was held that defendant's request to amend his answer so as to set up the above defense should have been granted.[3] The further a case has advanced, the more cautious should the trial court become in allowing an amendment. When the amendment is not asked until after the case has been closed, the argument heard, and the cause submitted, the amendment should not be allowed unless it is manifest that it is in furtherance of justice. And at that stage of the case, even if it were ever allowable, defendant should not be permitted to file a second amended answer in which he changes his attitude.[4]

**§ 936. When leave to amend may be refused.**— The court should refuse leave to amend if the party does not state in what particular he wishes to amend.[5] Thus an application to amend an answer so as to set up fraud, without stating the specific amendment which defendant wishes to make, is properly refused.[6] If an answer is stricken out for insufficiency, and defendant thereupon asks for time to file an amended answer, the court is not bound to grant the request if it would operate to delay justice or to injure the plaintiff; and it may in any case refuse to grant such time unless defendant states the character of the amendment he desires to make.[7]

[1] Rev. Stat. 1899, sec. 676; Weed Sewing Machine Co. v. Philbrick, 70 Mo. 646.

[2] Turner v. Thomas, 10 App. 338.

[3] Archer v. Merchants' Ins. Co., 34 Mo. 444, also presents a case where the ends of justice would have been subserved by allowing an amendment to the answer.

[4] Joyce v. Growney, 154 Mo. 253. See also § 992, *post*.

[5] Taylor v. Blair, 14 Mo. 437.

[6] Allen v. Ranson, 44 Mo. 263.

[7] Cashman v. Anderson, 26 Mo. 67; Robinson v. Lawson, 26 Mo. 69.

**§ 937. Taking leave to amend.**— Where the court acts upon an amended petition, this cures any irregularity in filing it without leave.[1] The taking leave to file an amended pleading is equivalent to a withdrawal of the former pleading, and leaves the case as if no such pleading had been filed.[2]

**§ 938. Guarding rights of adverse party.**— When amendments are allowed, courts are scrupulous in guarding the rights of the other party, so that the amendment shall not work a prejudice or an injustice. It has been well said that "where one party has taken a false step and seeks to retrace it, he should not be allowed to do so, unless his adversary who has been guilty of a similar laches be allowed the same privilege."[3] Therefore, where judgment has been rendered by default on a defective petition, the court may permit the petition to be amended after judgment, but an opportunity must be given the defendant to plead.[4]

**§ 939. Successive amendments.**— It is proper to regard every successive amendment as an amendment, not of the immediately preceding pleading, but of the one first filed by the party making the amendment.[5]

**§ 940. What will support an amendment.**— Any pleadings which are not absolutely void are amendable.[6] If an action for damages growing out of death by the wrongful act of defendant is brought in the name of the guardian of minor children, and the names of the minors are set out in the caption, but all the allegations are made in the singular number, and the conclusion alleges that "he" is damaged, and in the prayer "he" asks judgment, yet if the petition refers to the damage act, under the provisions of which and the circumstances detailed in the petition the minors alone are entitled to recover, such a petition states sufficient matter to support an amendment making the minors the substantial parties.[7] An amendment of a pleading which

[1] McCollum v. Lougan, 29 Mo. 451.

[2] Roberts v. State Ins. Co., 26 App. 92.

[3] Neidenberger v. Campbell, 11 Mo. 359. *A fortiori* must the adversary party be protected if he has not been guilty of any laches.

[4] Neidenberger v. Campbell, 11 Mo. 359. This was an action of ejectment against a tenant, and judgment was rendered against him by default. The landlord had no notice of the suit. It was held that plaintiff should not be permitted to amend his petition without giving the landlord leave to plead. See also § 942, *post*.

[5] Robertson v. Springfield & So. R. Co., 21 App. 633.

[6] Hardin v. Lee, 51 Mo. 241; Rosenheim v. Hartsock, 90 Mo. 357; Burnett v. McCluey, 92 Mo. 230; Avery v. Good, 114 Mo. 290.

[7] Weber v. Hannibal, 83 Mo. 262.

has been abandoned or stricken out, or in any manner ruled out of the case, is not permissible.[1] Where a plaintiff at the trial dismisses one of several counts of his petition, and the cause is tried as if the issues raised in that count were abandoned, he cannot, after the cause is submitted, and under a permission to amend his petition in order to make it conform to the proofs, so amend it as to again raise the issue made in the dismissed count.[2]

§ 941. **Where the cause is submitted on an agreed statement.**— Where after the pleadings are made up the parties agree upon a statement of facts and submit the cause on such agreed statement, the pleadings may be amended so as to make them conform to the submission; but they cannot be so amended as to have the effect of changing the terms of the submission or to meet the exigencies of the trial.[3]

§ 942. **Liberality in allowing amendments.**— Amendments are favored, and they should be liberally allowed in furtherance of justice.[4] The provisions of the Code relating to amendment of pleadings are liberal, and the courts should be at least as liberal as the statute.[5] Especially should they be freely allowed if the effect of allowing them is not prejudicial to the adverse party.[6] The rule is peculiarly applicable where the effect of the amendment is to save the cause from the bar of the statute of limitations.[7] But amendments should only be allowed on such terms as will prevent prejudice to the other party.[8] In a case where the court has jurisdiction of the subject-matter, of the particular proceeding, and of the defendant, if the allegations of the petition, instead of being clear and direct, are either defective or argumentative and ambiguous, the court should not dismiss the case, but should permit the plaintiff to amend so as to conform his petition to well-established rules.[9] Cases may occur

[1] Renfro v. Price, 22 App. 403.

[2] Cash v. Penix, 11 App. 597; Renfro v. Price, 22 App. 403. See in this connection Weber v. Squier, 51 App. 601.

[3] Richards v. Hartford Life Ins. Co., 68 App. 585.

[4] Dallam v. Bowman, 16 Mo. 225; Chauvin v. Lownes, 23 Mo. 223; Martin v. Martin, 27 Mo. 227; Dozier v. Jerman, 30 Mo. 216; House v. Duncan, 50 Mo. 453; Goddard v. Williamson, 72 Mo. 131; Hixon v. Selders, 46 App. 275.

[5] Carr v. Moss, 87 Mo. 447; Collins v. Glass, 46 App. 297.

[6] Utley v. Tolfree, 77 Mo. 307. See § 938, *ante*.

[7] Lottman v. Barnett, 62 Mo. 159. See next section.

[8] Ser v. Bobst, 9 Mo. 28; Witte Iron Works v. Holmes, 62 App. 372. See § 1011, *post*.

[9] Price v. St. Louis Mut. L. Ins. Co., 3 App. 262.

where the party has by his laches deprived himself of the right to amend.[1]

**§ 943. In order to save the bar of the statute of limitations.** Amendments are allowed for the express purpose of saving the cause from the operation of the statute of limitations, and courts should be liberal in allowing them, unless the cause of action set up in the amended petition is totally different from that in the original.[2] Where in order to avoid the statute of limitations the original petition alleged that a payment had been made by the defendant within ten years, but the evidence showed that the payment was made by a third person, who was a co-maker of the note with the defendant, the petition may be amended at the trial to make it accord with the fact, as such amendment changes neither the issues nor the cause of action.[3] If suit is commenced in the name of an unincorporated society, an amendment which allows certain members of the society to sue in their own behalf and in behalf of the other members, and to be substituted as parties plaintiff for the society, not only does not introduce a new cause of action, but it relates back to the commencement of the suit so as to prevent the bar of the statute.[4] Where an action for the death of a minor child is brought by the mother alone, she having been divorced from her husband, and the husband being unwilling to be joined as plaintiff was made a defendant, plaintiff may, even after the expiration of the time limited for bringing such action, file an amended petition changing the husband from a party defendant to a party plaintiff.[5]

**§ 944. Same — Special statute of limitation.**— In actions on mechanics' liens the power of amendment of pleadings will be liberally exercised to prevent the operation of the special limitation governing such actions.[6] But in an action against a steamboat, plaintiff cannot amend his petition so as to introduce a new cause of action, and thereby retain his lien on the boat, which had expired before the filing of the amendment.[7]

**§ 945. Not allowed for purpose of curing defective process.** An amendment cannot be made for the purpose of curing de-

[1] Stewart v. Glenn, 58 Mo. 481.

That courts should also be liberal as to the time when the amendment of a pleading may be allowed is shown in § 984, *post*.

[2] Lottman v. Barnett, 62 Mo. 159.

[3] Bennett v. McCanse, 65 Mo. 194.

[4] Lilly v. Tobbein, 103 Mo. 477.

[5] Buel v. St. Louis Transfer Co., 45 Mo. 562.

[6] Hannon v. Gibson, 14 App. 33.

[7] Gibbons v. Steamboat Fannie Barker, 40 Mo. 253.

fective process, or to give that court jurisdiction which before the amendment had none. A personal action against a single defendant was instituted in a county other than that in which defendant resided, but the summons was served on the defendant in the county of his residence; it was held that plaintiff could not, by so amending his petition as to convert the personal action into a real one affecting land situated in the county where the action was instituted, make such service valid.[1]

§ 946. **Party may be compelled to amend.**— When the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, or if the pleading fails in any other respect to conform to the requirements of law, the court may require such pleading to be made definite and certain, and to otherwise conform to the law, by amendment.[2] The subject of attacking pleadings on account of defects apparent on their face is treated of in chapter XXXI, and in the chapter on The Demurrer (ch. XXXII). The cases in which it is proper to move that the pleading be made more definite and certain, and those involving the action of the court upon such a motion, are collected in chapter XXXIII. It is only necessary to say here that the power of the court to order an amendment under such circumstances as those mentioned in the above section is full and ample.[3] And if a party is surprised by an amendment which the other party makes under such circumstances, the case should be continued at the cost of the adverse party.[4] Under the above section[5] a variance between the *allegata* and the *probata* cannot be held to be fatal, since the court may order an amendment upon terms.[6]

§ 947. **Same — Upon cause being remanded.**— Where the action is for work and labor done and materials furnished, but the petition fails to show the nature of the contract, plaintiff should be required, upon the remanding of the cause by the appellate court, to amend his petition so as to make it conform to the law.[7]

§ 948. **Where part of a pleading is stricken out.**— Where there are several causes of action, or several defenses, a demurrer or a motion to strike out may be sustained as to a part of such causes of action or defenses, leaving, however, one or more of the

[1] Huff v. Shepard, 58 Mo. 242.
[2] Rev. Stat. 1899, sec. 612.
[3] Atteberry v. Powell, 29 Mo. 429.
[4] Fischer v. Max, 49 Mo. 404. See § 1008, *post*.
[5] Rev. Stat. 1899, sec. 612.
[6] Turner v. Chillicothe & Des Moines R. Co., 51 Mo. 501; Gaty v. Sack, 19 App. 470.
[7] Phillippi v. McLean, 5 App. 587.

causes of action or of the defenses untouched. Or a part of a single pleading may be stricken out, leaving still a subsisting cause of action or defense. In such cases the party may proceed to trial upon the causes or defenses remaining, and he cannot be required to file an amended pleading.[1] If, on the sustaining of a demurrer as to one of two defendants, the petition has been dismissed as to him, but it was not demurred to or adjudged insufficient as to the other defendant, it is not necessary that an amended petition should be filed in order to proceed against the latter.[2]

**§ 949. How the amendment is to be made.**— In every pleading, whether amendatory or supplemental, the party must set forth in one entire pleading all matters necessary to the proper determination of his action or defense.[3] There can be but one pleading of the same character in the case at the same time, and all matters which are proper to be stated in such a pleading must be embraced in that one pleading. Our practice recognizes no such thing as a petition and a supplemental petition, or an answer and a supplemental answer, in the same case at the same time.[4] Parties will not be permitted to stipulate that the original and amended answers shall be considered as one.[5] And all the cases above cited hold more or less directly that where an amended pleading is filed the original pleading must be considered as abandoned, and possesses no longer any force as a pleading; though, as we shall see later, it may be still used as an admission of the party.[6]

**§ 950. Same — By interlineation.**— Minor amendments in pleadings may be made by way of erasure or interlineation. Of this character are amendments adding or striking out the name of a party, correcting dates and obvious errors, and those of a similar kind; as by striking out a word.[7] But where new aver-

[1] Munford v. Keet, 154 Mo. 36; State to use v. Finn, 19 App. 560; Powell v. Palmer, 45 App. 236.

[2] Norton v. St. Louis, 97 Mo. 537.

It will be seen by reference to the chapter on The Demurrer (§ 844, *ante*) that the party does not by such course lose his right to have the action of the trial court in sustaining the demurrer or motion reviewed by the appellate court, if he has properly saved his exceptions. But if he does file an amended pleading he loses the benefit of his exceptions. See § 806, *ante*.

[3] Rev. Stat. 1899, sec. 666.

[4] Nedvidek v. Meyer, 46 Mo. 600; Ward v. Davidson, 89 Mo. 445; Skinner v. Hutton, 33 Mo. 244; Woolfolk v. Woolfolk, 33 Mo. 110; Ticknor v. Voorhies, 46 Mo. 110; Hackett v. Philadelphia Underwriters, 79 App. 16.

[5] Basye v. Ambrose, 28 Mo. 39.

[6] See § 1005, *post*.

[7] Campbell v. Wolf, 33 Mo. 459.

ments are made for the purpose of introducing a new averment, the pleading should be rewritten and should set forth all the matter necessary to constitute the complete pleading, leaving the abandoned pleading undefaced.[1] A plaintiff was given leave to amend his surname in the declaration, and accordingly wrote in the margin "amended by substituting the name Boisse for Bizet wherever it occurs;" but this was held not to constitute an amendment.[2] In a proceeding to contest a will, a mere formal amendment for the purpose of joining the husband of a female plaintiff may be made without filing a new petition.[3] On the trial of a suit for delinquent taxes, the tax-bill filed with the petition contained three columns of taxes and indicated the years for which they were due, but did not designate the particular funds to which the amounts in the several columns belonged, the word "tax" alone being written at the head of each column. It was held that the bill might be amended by writing the word "state" at the head of the first column, the word "county" at the head of the second column, and the word "school" at the head of the third column.[4] As a general rule a supplemental answer filed at the close of the case and after the evidence is all in cannot be made by erasure and interlineation.[5]

**§ 951. Where the amendment is not actually made.**— If an amendment has been permitted, but the actual change of language has not been made, the appellate court may properly treat it as if it had been in fact made.[6]

**§ 952. The number of amendments allowable.**— The provision of section 623[7] that if a third pleading is adjudged insufficient no further pleading shall be filed, but judgment shall be rendered, is mandatory; the court has no power to permit the filing of a subsequent pleading.[8] But that section applies only to cases in which three pleadings have been adjudged insufficient upon demurrer or motion.[9] A pleading which is voluntarily amended is not to be counted as one of the three.[10] Nor is it

[1] South Joplin Land Co. v. Case, 104 Mo. 572.

[2] Boisse v. Langham, 1 Mo. 572.

[3] Sunderland v. Hood, 13 App. 232.

[4] State ex rel. v. Phillips, 102 Mo. 664.

[5] Merchants' Ins. Co. v. Excelsior Ins. Co., 4 App. 578. (This is taken from the opinion on file, and not from the syllabus in the report.)

[6] Underwood v. Bishop, 67 Mo. 374; Stone v. Travelers' Ins. Co., 78 Mo. 655; Habel v. Union Depot R. Co., 140 Mo. 159. But see § 1009, *post.*

[7] Rev. Stat. 1899.

[8] Beardslee v. Morgner, 73 Mo. 22.

[9] Spurlock v. Mo. Pac. R. Co., 93 Mo. 13, 93 Mo. 530; Barton v. Martin, 54 App. 134.

[10] Barton v. Martin, 54 App. 134.

sufficient that the third pleading has been held bad upon objection to the introduction of evidence upon the ground that it stated no cause of action.[1] And the fact that the case was tried upon a third amended petition, without any showing that the prior petitions had been adjudged insufficient on demurrer or motion, will not warrant the court in excluding the introduction of all evidence on the trial.[2] The fact that judgment has been entered on demurrer to the second amended petition will not bar a subsequent action on a sufficient petition.[3]

[1] Spurlock v. Mo. Pac. R. Co., 93 Mo. 13.
[2] Id., 93 Mo. 530.
[3] Bennett v. Southern Bank, 61 App. 297.

## CHAPTER XLI.

### AMENDING PLEADINGS — ADDING, DROPPING OR CHANGING PARTIES.


§ 953. The statutory provisions.
954. Adding parties plaintiff.
955. Adding parties defendant.
956. Dropping parties.
957. Substituting parties and correcting names.
§ 959. Suit in name of the state.
960. Guardian or minor.
961. Instances of changing parties.
963. Same — Corporation or individuals.


**§ 953. The statutory provisions.**— When a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in by an amendment of the petition, or by a supplemental petition and a new summons.[1] Furthermore, the court may at any time before final judgment, in furtherance of justice and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party.[2] If, pending the action, the interest in the cause of action is transferred by any means other than by death, marriage or other disability of the party, the action may be continued in the name of the original party, if the transferee will indemnify him against costs and damages, or the court may allow the person to whom the transfer is made to be substituted in the action; and upon application of the party making the transfer, the court must require the transferee either to give such indemnity or to cause himself to be substituted as a party, and upon his omission to do one or the other the suit will be dismissed.[3]

**§ 954. Adding parties plaintiff.**— Prior to the adoption of the Code in this state the supreme court declared the rule to be that if one who was a necessary party plaintiff was not named as one of the plaintiffs at the institution of the suit, his name could not be afterwards added by amendment. The position taken by the court was that "mistakes in the names of parties have been amended, but to allow new plaintiffs or defendants to be inserted in a declaration by way of amendment would be

[1] Rev. Stat. 1899, sec. 658. [2] Rev. Stat. 1899, sec. 657. [3] Rev. Stat. 1899, sec. 764.

going a length wholly unprecedented;"[1] and the judgment was reversed for that reason. A more liberal rule now prevails, as appears from the sections of the statute cited in the preceding section. If a suit is brought in the name of a *cestui que trust*, the trustee may be added as a party plaintiff, and the petition amended accordingly.[2] And this may be done in ejectment, where the action was begun by the beneficiaries in a deed of trust.[3] If it appears on the trial of an interplea that the interpleader claims the property only as *cestui que trust*, he may substitute his trustee as interpleader.[4] Where the suit is begun by a woman, and she afterward marries, her husband may be made a joint plaintiff by amendment at any time before final judgment.[5] But if an action is brought by the husband for a cause of action belonging to the wife, the wife cannot be made a party plaintiff by amendment, since such an amendment would constitute a change of the cause of action; before the amendment the husband was the real plaintiff, but after the amendment the wife would be the real plaintiff.[6] In a case decided by the Kansas City court of appeals a plaintiff in replevin was allowed to amend both his petition and affidavit by adding a co-plaintiff.[7]

**§ 955. Adding parties defendant.**— The power of the court to direct that other parties shall be joined as defendants, where such joinder is necessary to a complete determination of the controversy, is unquestioned.[8] Even parties who do not become interested in the property in litigation until after the action is commenced may be made defendants by amendment.[9] Thus, where a suit in equity was brought to charge the separate estate of a married woman, and pending the suit a sale was made under a mortgage of the property sought to be charged, the petition may be amended by making the mortgagee a party defendant, so as to charge the

[1] Chouteau v. Hewitt, 10 Mo. 131, 134.

[2] Ragan v. Kansas City & S. E. R. Co., 111 Mo. 456.

[3] Ebersole v. Rankin, 102 Mo. 488. In this case an heir who had been omitted as plaintiff was also allowed to be made such by amendment.

[4] Winklemaier v. Weaver, 28 Mo. 358. It may be added as illustrating the liberality of the courts in this respect that it has been held that a justice of the peace may allow an amendment by adding a new party plaintiff before the trial. Schergens v. Wetzell, 12 App. 596. And this may be done in the circuit court after an appeal from the justice. House v. Duncan, 50 Mo. 453.

[5] Crockett v. St. Louis Tr. Co., 52 Mo. 457.

[6] Courtney v. Sheehy, 38 App. 290.

[7] Deyerle v. Hunt, 50 App. 541.

[8] O'Fallon v. Clopton, 89 Mo. 284; McLeod v. Snyder, 110 Mo. 298.

[9] Reyburn v. Mitchell, 106 Mo. 365.

surplus in his hands with the payment of the debt.[1] But this rule cannot be so extended as to prejudice the adverse party. Therefore in an action to enforce a mechanic's lien, which was brought by a materialman against the owner alone, the petition cannot be amended after the expiration of the ninety days allowed for bringing the suit so as to make the contractor a party defendant.[2] But an amendment correcting the name of the contractor is allowable.[3] Where the action is on a special tax-bill, and the party named in the tax-bill, and who was also named as defendant in the action, was dead at the time, his heirs cannot, after the action is barred as to them, be brought in by the issuance of amended tax-bills, and by amending the petition so as to make them defendants.[4] The fact that the title of a cause is changed because of the marriage of the female plaintiff does not make the suit a new one; it remains the same suit, though it has become necessary to make the husband a party.[5]

§ 956. **Dropping parties.**— Amendments may be made by striking out the name of a party; and, if the ends of justice require it, such amendment must be permitted.[6] Where the name of one of the plaintiffs is stricken out, this does not necessarily change the cause of action,[7] any more than the cause of action is changed by adding the name of the husband and changing the name of the female plaintiff, where she marries after the institution of the suit.[8] If a wife is improperly joined in an action of ejectment brought by the husband for her land, her name may be stricken out, even in the appellate court.[9] Where, in an action before a justice, three persons sue as obligees, the statement cannot be amended in the circuit court by dropping the names of two of the plaintiffs.[10] But if a party has been made a co-plaintiff through inadvertence, who has no interest in the suit, and is neither a necessary nor proper party, his name may be stricken out of the petition, even after judgment.[11]

§ 957. **Substituting parties and correcting names.**— The name of one party plaintiff may be stricken out and another sub-

[1] Pratt v. Walther, 42 App. 491.
[2] Bombeck v. Devoorss, 19 App. 38.
[3] Newman v. Jefferson City, L. & S. W. R. Co., 19 App. 100.
[4] Eyerman v. Scollay, 16 App. 498.
[5] Church v. Chicago & Alton R. Co., 119 Mo. 203.
[6] Thompson v. Moseley, 29 Mo. 477.
[7] Davis v. Ritchie, 85 Mo. 501. See, on this point, §§ 958, 961 and 970, *post.*
[8] Church v. Chicago & Alton R. Co., 119 Mo. 203.
[9] Mueller v. Kaessman, 84 Mo. 318.
[10] Slaughter v. Davenport, 151 Mo. 26.
[11] Powell v. Banks, 146 Mo. 620.

stituted for it even at the trial;[1] as where the cause of action is assigned after the institution of the suit,[2] or where the one whose name was stricken out was made a plaintiff through ignorance of the real facts.[1] Where plaintiffs sue as a corporation, they may amend the petition by inserting their individual names as plaintiffs, and alleging that they were copartners doing business under the name in which the suit was first brought.[3] But where the original petition states a cause of action against individuals as constituting a copartnership, and the amended petition states one against a corporation, the corporation, before the court can obtain jurisdiction over it, must be in court on voluntary appearance, or must be brought in by service of new process; and it is immaterial that the name of the original firm was the same as that adopted by the corporation, and that the stockholders in the corporation had previously composed the firm.[4] If, while a suit is pending against a railroad company, the defendant company is consolidated with another, the consolidated corporation may be made a party defendant, in place of one of the original companies, by a mere amendment of the pleadings, and without the issuance of process for such consolidated corporation. The ground of this decision was that an action commenced against one of the former corporations does not abate by the consolidation, though the effect may be to dissolve the old corporation as such; the action may be revived against the new corporation by a mere amendment.[5]

§ 958. The change of a party plaintiff by the substitution of a new plaintiff is not necessarily a change in the cause of action.[6] In *Whitehill & Son v. Keen*,[7] the action was brought by attachment in the name of Whitsel & Son. Plaintiff was afterwards permitted to correct the name in the petition and writ to Whitehill & Son. It appears that the latter name was the name of a corporation, and that there was no evidence whether there was such a firm or corporation as Whitsel & Son. The court says: "Treating the error in the plaintiff corporation as clerical merely,

[1] Tayon v. Ladew, 33 Mo. 205.

[2] Wellman v. Dismukes, 42 Mo. 101; Todd v. Crutsinger, 30 App. 145.

[3] Ward v. Pine, 50 Mo. 38. See also § 963, *post*.

[4] Thompson v. Allen, 86 Mo. 85. A case involving this question is that of Hajek v. Bohemian-Slavonian Ben. Society, 66 App. 568.

[5] Kinion v. Kansas City, Ft. S. & M. R. Co., 39 App. 575. Consult also § 963, *post*.

[6] School District v. Wallace, 75 App. 317. See in this connection § 956, *ante*, and §§ 961, 970, *post*.

[7] 79 App. 125.

which is apparent, the circuit court unquestionably had the right to order the mistake corrected by proper amendment."[1] In an attachment suit plaintiff may amend his petition, affidavit and bond by correcting the christian name of the defendant.[2] In one case, being an action in ejectment, the name of one plaintiff was stricken out and the name of her mother was substituted, it being shown to the court that when the action was brought it was not known that the mother was living and the daughter was made a plaintiff as her heir.[3]

§ 959. **Suits in name of the state.**—Where an action is brought upon an official bond and plaintiff sues in his own name, an amendment may properly be permitted substituting the state as the nominal plaintiff.[4] If, on the other hand, the action is improperly brought in the name of the state to the use of a party, where the bond was given to such party, the petition may be amended by striking out the name of the state as plaintiff and substituting that of the obligee in the bond.[5]

§ 960. **Guardian or minor.**—Where an action is brought for the death of a parent in the name of the guardian of the minor children, and the entire petition reads as though the guardian was suing and was claiming damages, but the names of the minor children are stated in the caption, and the petition is manifestly brought under the damage act, under which act the children alone are entitled to recover, it is erroneous to refuse leave to amend the petition by making the minor children the substantial plaintiffs, though the request to amend is not made until after the trial has begun.[6]

§ 961. **Instances of changing parties.**—An action upon a special tax-bill was brought in the name of the party to whom it was originally issued and made payable. At that time the bill was held by a certain bank as collateral security, but while the action was pending the tax-bill was assigned to the bank, and the bank was then substituted as plaintiff, and an amended petition was filed in its name. In overruling the objection that the amendment was improper because it substituted a cause of action which did not exist before the amendment was made, the supreme court says that the decision of that question turns upon the ques-

[1] 79 App., p. 129. Yet in the eye of the law the firm and the corporation are two different persons. Allen v. Frumet Min. & Smelting Co., 73 Mo. 688. See note 4 on preceding page.

[2] Middleton v. Frame, 21 Mo. 412.

[3] Tayon v. Ladew, 33 Mo. 205.

[4] State ex rel. v. Shelby, 75 Mo. 482.

[5] Busche v. McElroy, 12 App. 567.

[6] Weber v. Hannibal, 83 Mo. 262.

tion whether the original contractor had the right to sue on the bill while the bank held it as collateral security. For if he had that right, and the bill was afterward absolutely transferred to plaintiff, section 764[1] authorizes the substitution of the bank as plaintiff. This question was answered in the affirmative, it appearing that while the bank held the tax-bill as collateral it turned the bill over to the original contractor for collection and authorized him to sue, if necessary. The court says that this authority constituted the contractor the trustee of an express trust, and gave him the right to sue in his own name, and the fact that it was impressed with a trust in favor of the bank did not deprive him of that right.[2] In *Lottman v. Barnett*,[3] the action was instituted against eight defendants, charging that the death of plaintiff's husband was caused by the carelessness and negligence of defendants and their servants in the construction of a certain building. The plaintiff afterwards dismissed the action as to all but one of the defendants, and filed an amended petition charging that the sole remaining defendant was the architect in charge of the construction of the building, and that her husband's death was caused by the negligence of this defendant as such architect in the direction and management of the work, and in the use by him of improper and unsafe materials. It was held that the amendment was allowable, and that the cause of action was not changed.[4]

**§ 962. Same — Further instances.** — Where a creditor's bill was filed to subject lands to the satisfaction of a judgment, and after the institution of the suit the legal title to the lands passed to the wife of the grantee of the debtor, this did not make it necessary that plaintiffs should amend their petition, though they were at liberty to do so if they chose.[5] If, at the trial of an interplea, it is objected that the interpleader claims the property only as a *cestui que trust*, he may substitute his trustee as interpleader.[6] The case of *Harkness v. Julian*[7] carries the right of substitution to the utmost limit. An action was commenced by A, as an administrator of B, alleging that defendant executed his promissory note to B in his life-time. Defendant in-

[1] Rev. Stat. 1899.

[2] Springfield v. Weaver, 137 Mo. 650.

[3] 62 Mo. 159.

[4] This rule is sharply emphasized by the remarks of the supreme court in a later case, in which the above case is commented on. Lumpkin v. Collier, 69 Mo. 170.

[5] Jamison v. Bagot, 106 Mo. 240.

[6] Winklemaier v. Weaver, 28 Mo. 358.

[7] 53 Mo. 238.

terposed the defense that plaintiff had no legal capacity to sue as the administrator of B, since B was still alive. Thereupon the plaintiff was permitted to amend his petition so as to sue as the administrator of C, alleging in the petition that B had transferred the note to C during the life-time of the latter. The supreme court says that it cannot see how the amendment changed the nature of the claim or of the defense. It says: "The suit is still founded on the same note. It is still charged that the note was executed by defendant to B, but it is added that it was transferred by B to C, and that plaintiff owns it, not as the representative of B, but of C, it having been originally stated by mistake that the plaintiff was the administrator of B, who is still alive. It cannot be seen how this amendment could injure the defendants, and I think it comes exactly within the objects of the statute, and that the court properly permitted the amendment." (p. 242.)

§ 963. **Same — Corporation or individuals.** — In *Lilly v. Tobbein*[1] the proceedings were instituted in the name of an unincorporated church society, which it was decided had no power or legal capacity to sue, and thereupon an amended petition was filed, adding as plaintiffs certain members of the church who were alleged to be its trustees, and who sued for themselves and all other members of the association. It was held that the amendment was proper. In a decision by the Kansas City court of appeals it is said that, while the substitution of a new party plaintiff is a change in the cause of action and therefore improper, yet the mere change of the name of the plaintiff from that of "Agency Village School District No. 3" to that of "School District of the Inhabitants of the Village of Agency" is not the substitution of a new party, but is simply a correction in the name of the party.[2] In a case before the St. Louis court of appeals, an attachment was brought in the name of certain plaintiffs as directors of a school district. The petition alleged the name and corporate existence of the school district and its capacity as such to sue, and contained no direct averment of any legal right in the plaintiffs to sue as directors. Though the suit was brought by attachment, the trial court afterwards permitted an amendment to be made so as to make the action one by the school district as a corporate body, and by correcting the name of the school district. The court of appeals held that this amend-

[1] 103 Mo. 477.

[2] School District v. Wallace, 75 App. 317.

ment was proper.[1] But in a common-law action against a corporation for the conversion of a promissory note, the plaintiff, failing to secure service on the corporation, made certain stockholders parties, and filed an amended petition alleging the dissolution of the corporation and seeking to make the additional defendants liable under section 987,[2] which provides that if a corporation dissolves leaving debts unpaid suits may be brought against any person or persons who are stockholders at the time of dissolution without joining the company in the suit. It was held that this constituted a change in the cause of action, and that the amended petition should be stricken out.[3] In another case there were two organizations belonging to the same fraternal order, with similar, but not identical, names, one of which was incorporated and the other not. An action was brought on a contract which was in fact made with the corporate body, but the petition and summons named the unincorporated organization as the defendant, the return of the sheriff showed service upon the unincorporated organization, and it appeared and pleaded in abatement and to the merits, alleging that it was not incorporated. It was held that the application of plaintiff to amend the name of the defendant to that of the corporation was properly refused.[4]

[1] Davis v. Boyce, 73 App. 563.

[2] Rev. Stat. 1899.

[3] Sears v. Missouri Mortgage Loan Co., 56 App. 122.

[4] Hajek v. Bohemian-Slavonian Ben. Society, 66 App. 568. Other decisions on this point will be found in § 958, *ante*.

## CHAPTER XLII.

### THE AMENDMENT MUST NOT CHANGE THE CAUSE OF ACTION.


§ 964. The rule on this subject.
965. The rule in justices' courts applies.
966. Decisions applying the rule.
967. The test of change.
968. A further test.
969. Changing action from legal to equitable.
970. When a change of parties effects a change in the cause of action.
972. Actions arising in contract and those arising in tort.
973. Actions *ex delicto* not interchangeable.
974. Action on joint and action on several contract.
975. When there is a change in the prayer for relief.
976. Cases illustrating the rules as to change in cause of action.
977. Same — In attachment cases.
978. Same — In mechanics' lien cases.
979. Same — In replevin cases.
980. Same — In actions against carriers.
981. Same — In actions against railroad companies.
982. Same — Action by employee.
983. Introducing matter occurring after suit brought.


**§ 964. The rule on the subject.**— A petition cannot be amended by substituting a different cause of action for that stated in the original petition.[1] Even the liberal provisions of the Code do not permit such a change.[2] Nor will section 661,[3] which provides that a petition may be amended of course and without costs at any time before the answer is filed, justify such an amendment.[4]

**§ 965. The rule in justices' courts applies.**— The rule as to amendment in cases originating before a justice, and in those originating in the circuit court, is in no wise different in principle. The consensus of the decisions in regard to amendments in the former class of cases is that the amendment is allowable

[1] Pruett v. Warren, 71 App. 84.

[2] Lumpkin v. Collier, 69 Mo. 170; Daudt v. Machens, 13 App. 592; Parker v. Rodes, 79 Mo. 88; Heman v. Glann, 129 Mo. 325.

[3] Rev. Stat. 1899.

[4] Lumpkin v. Collier, 69 Mo. 170; Parker v. Rodes, 79 Mo. 88. There is one decision of the St. Louis court of appeals which apparently holds that an amendment is not to be held improper because it changes the cause of action. Robertson v. Springfield & So. R. Co., 21 App. 633.

where its effect is to omit something from the original statement which yet leaves a cause of action stated in the original statement, or where some averment is added which was within the manifest intendment of the pleader in framing the original statement, thus in each case leaving the cause of action substantially the same.[1] Therefore an amendment which merely amplifies the original statement is proper.[2]

**§ 966. Decisions applying the rule.**— Where the original petition is merely an inartistic and imperfect statement of the cause of action, and the amendment is in correction of it, but both are based upon the same statutory grounds, the amendment does not constitute a new demand, and there is no change in the cause of action.[3] An amendment does not constitute a new cause of action which simply adds another claim for loss from overflow to plaintiff's land additional to those set out in the original petition.[4] In an action based upon negligence, an amended petition which simply undertakes to specify the negligent acts complained of, where the original petition contained only a general charge of negligence, does not constitute a change of the cause of action.[5] What was intended to be embraced in the original cause of action must be gathered from the face of the pleading; the court cannot inquire what was the private intent of the party, but can only look to the paper to gather the information.[6]

**§ 967. The test of change.**— There are two special tests by which to determine whether a second petition is an amendment of the first or is the substitution of a new cause of action. These are, *first*, that the same evidence will support both petitions; and *second*, that the same measure of damages will apply to both. If these tests are answerable in the affirmative, it is an amendment; if in the negative, it is a substitution.[7] There are two cases which sharply draw the distinction between amendments which meet this test and those which do not. *Lottman v. Barnett*[8] is a case

[1] Thieman v. Goodnight, 17 App. 429; Sturges v. Botts, 24 App. 282; Heman v. Fanning, 33 App. 50; Brennan v. McMenamy, 78 App. 122.

[2] Eubank v. Pope, 27 App. 463.

[3] Sims v. Field, 24 App. 557.

[4] James v. Kansas City, P. & G. R. Co., 69 App. 431.

[5] Gourley v. St. L. & S. F. R. Co., 35 App. 87.

[6] Gregory v. Wabash, St. L. & P. R. Co., 20 App. 448; Sturges v. Botts, 24 App. 282.

That an amendment cannot be made in order to give the court jurisdiction, if it did not have it before the amendment was made, see § 945, *ante*.

[7] Scovill v. Glassner, 79 Mo. 449; Sims v. Field, 24 App. 557; Liese v. Meyer, 143 Mo. 547.

[8] 62 Mo. 159.

in which it would require precisely the same evidence to support the action after the amendment as before. *Lumpkin v. Collier*[1] is a case of a directly opposite character. In an appellate court case,[2] it is stated that the doctrine as to the first test, viz., that the evidence must be the same, rests on mere *dicta*, and that what is really meant is that the right of amendment is not to be determined by the quantity of the evidence, but by the character of the evidence necessary to support both petitions; and not by the *quantum*, but by the standard of damages under both. The test is also criticised in *Pratt v. Walther*,[3] where it is said: "One of these so-called tests is that the evidence which would support the original would not support the amended petition. But if this test is to prevail, no amendment is permissible except such as is necessary to cure mere defectiveness of statement. Obviously, it is not broad enough; since, if an amended petition must in all cases be such that the same evidence which would support the original would support it, no amendment is necessary. Another so-called test is that the amended petition should embrace the original cause sued on, with a like rule in respect of the measure of damages. But of what value is this test, where the object of the suit is not to recover damages?" (p. 495.) The court adds that the test above laid down can never be considered a proper test in suits of an equitable character.[4]

§ 968. **A further test.**—An additional test is laid down in a recent decision of the supreme court,[5] where it is said: "As long as the plaintiff adheres to the contract or injury originally declared on, an alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. If the amendment is merely the same matter more fully or differently laid to meet the possible scope of the testimony, it is not a change of the cause of action." (p. 364.) In that case, which was an action to recover the value of a cow which was killed by defendant's train, the original statement charged that the train was run at a greater rate of speed than that allowed by ordinance, and also that there was a failure to ring the bell or sound the whistle as required by statute, but there was no allegation in connection with the last ground of recovery that the cow was killed by reason of such failure. The

[1] 69 Mo. 170.

[2] Schwab Clothing Co. v. St. Louis, I. M. & S. R. Co., 71 App. 241.

[3] 42 App. 491.

[4] 42 App., p. 495.

[5] Rippee v. Kansas City, Ft. S. & M. R. Co., 154 Mo. 358.

amended statement supplied this omission, and it was held that no new cause of action was stated.

**§ 969. Changing action from legal to equitable.**—A change from a legal to an equitable proceeding is not permissible. Thus where the original petition is in the nature of an action at law upon an administrator's bond, an amended petition which seeks to set aside the administrator's final settlement is a substitution of one cause of action for another.[1] But where both the original and the amended petition are equitable in their nature, plaintiff seeking in each of them to charge the separate estate of the same married woman for the same debt, and upon the same promise made by her, the only point of divergence being that after bringing the suit a portion of the estate sought to be charged was diverted to the satisfaction of a prior lien, and that the residue remains in the hands of a different custodian, an amended petition setting out these additional facts, praying for the relief originally prayed for, and also for appropriate additional relief, does not change the cause of action.[2] There is a decision of the supreme court which apparently goes further than the decision by the court of appeals just cited. In that case, which was an action of ejectment, the plaintiff was permitted to file an amended petition containing two counts, the first of which set out the plaintiff's title and other matters of equity, and prayed for equitable relief, viz., that two deeds through which defendant claimed title should be set aside; the second count was a count in ejectment, the same as in the original petition. It was held that the amended petition did not set up a new or different cause of action, and that the amendment was properly allowed.[3]

**§ 970. When a change of parties effects a change in the cause of action.**—In considering the question how far a change of parties is allowable, and whether or not parties may be added, dropped or substituted, the question whether a change of parties effects a change in the cause of action has been incidentally discussed.[4] Some decisions are here added to those above, the following being a case in which the point is directly passed upon: The action was brought by "B. F. C., agent of the Goodspeed Publishing Company," and leave was asked to strike out the name of B. F. C. and insert in lieu thereof the names of C. L. Goodspeed and W. A. Goodspeed, for the reason that they constituted the Goodspeed Publishing Company. The motion to

[1] Phillips v. Broughton, 30 App. 148.
[2] Pratt v. Walther, 42 App. 491.
[3] Morrison v. Herrington, 120 Mo. 665.
[4] See ch. XLI.

amend was properly refused.[1] Where, in an action in ejectment, the petition is amended by causing it to state that both husband and wife were entitled to the possession, instead of the wife alone, the cause of action is not changed.[2] It seems, however, that this rule is not to be carried so far as to substitute the wife for the husband as the real party in interest. If an action to recover money belonging to the wife is instituted in the name of the husband alone, the wife cannot be made a party plaintiff by amendment.[3] Where an action is brought on a special tax-bill against a married woman, who was the owner of the property sought to be charged, without joining the husband, the plaintiff may, after the expiration of the special period of limitation, amend by joining the husband as a party for the purpose of subjecting the interest of the wife in the land to the lien of the tax-bill; and a judgment against her interest after such amendment is proper.[4] If the object of the proceeding is to reach a certain fund, and the custodian of that fund is changed pending the litigation, the new custodian may be brought in at any stage of the proceedings. Bringing in the party in whose hands the fund is, for the purpose of charging the fund, is not in any sense a change of the original cause of action.[5]

§ 971. Plaintiff filed a petition and an amended petition against school district number 4, township 22, range 9, and three individuals who were the directors of the district. He afterwards filed a second amended petition making the three directors sole defendants, the last petition containing substantially the same allegations as the original petition, but praying judgment against the individual defendants only. It was held that this last petition was a substitution of a new cause of action.[6] But a change in the name of the plaintiff from "Agency Village School District No. 3" to that of "School District of the Inhabitants of the Village of Agency" is not the substitution of a new party, and does not change the cause of action.[7] Where the whole context of the original petition warrants the conclusion

[1] Clements v. Greenwell, 40 App. 589.

[2] Hughes v. McDivitt, 102 Mo. 77. In that case both the husband and wife were originally made parties plaintiff.

[3] Courtney v. Sheehy, 38 App. 290.

[4] Smith v. Boese, 39 App. 15. The same rule is announced by the supreme court in a mechanics' lien suit. Latshaw v. McNees, 50 Mo. 381. That case also holds that the defect of parties is not cured by the statute of *jeofails*.

[5] Pratt v. Walther, 42 App. 491.

[6] Hall v. School District, 36 App. 21.

[7] School District v. Wallace, 75 App. 317.

that the suit was one by a school district as a corporation, and that the allusion in the petition to the directors was mere surplusage, the mere addition of a word to the corporate name is not such a total change of the party plaintiff as to constitute a departure from the original petition.[1] For rectifying a mistake in the name of a party does not work a change in the cause of action.[2] If the title of the cause is amended by setting out the individual names of the partners in place of the firm name, there is no change in the cause of action.[3] An action was brought by a married woman to recover for the death of her minor child. Plaintiff had been divorced from her husband, and he was still living, but at the time of instituting the action his consent to be joined as plaintiff had not been obtained, and he was accordingly made a defendant. After the filing of the petition, and more than a year after the cause of action accrued, plaintiff was allowed to amend her petition by changing the husband from defendant to plaintiff so that the action should stand in the names of the parents jointly. The supreme court approved this course on the ground that the cause of action was not changed, and held that the amendment related back to the original commencement of the action so as to save the bar of the special statute governing such actions.[4] But where in a similar action the two parents alleged that they were the parents of the child, and the relationship was denied by the answer, and after verdict, upon the hearing of the motion for a new trial, it appeared that the child was born before the marriage of the plaintiffs, plaintiffs would not be permitted to amend their petition and verdict by striking out the name of the male plaintiff, and allow judgment to stand in favor of the mother.[5]

**§ 972. Actions arising in contract and those arising in tort.** If the original petition sets out an action *ex delicto*, an amended petition declaring on a contract is bad.[6] And a petition *ex contractu* cannot be amended by adding a count sounding in tort.[7] But it is held in *Robertson v. Springfield & S. R. Co.*[8] that the

[1] Davis v. Boyce, 73 App. 563.

[2] House v. Duncan, 50 Mo. 433. And that case was one where the change was made in the circuit court after an appeal from a justice.

[3] Beattie v. Hill, 60 Mo. 72.

[4] Buel v. St. Louis Transfer Co., 45 Mo. 562.

[5] Habel v. Union Depot R. Co., 140 Mo. 159.

[6] Drake v. St. Louis & S. F. R. Co., 35 App. 553.

[7] O'Riley v. Diss, 48 App. 62.

[8] 21 App. 633.

amendment of a petition before trial, which changes the form of the action from one *ex contractu* to one *ex delicto*, is proper, if the petition still relates to the same transaction or tort as that embraced in the original petition. An allegation in an amended petition that a certain overpayment therein averred was made by reason of the false and fraudulent representations of defendant does not necessarily change the cause of action from *assumpsit* for money had and received to an action *ex delicto* for fraud and deceit.[1] Where the original petition was in trover for certain goods, and the amended petition charged that defendant had maliciously sued out an attachment and caused the goods to be seized and sold at a sacrifice, this was a new and distinct cause of action, and the amendment was improper.[2] In *Lumpkin v. Collier*[3] the original action was one *ex contractu*, being to enforce a bond of indemnity given to the sheriff to induce him to seize under execution certain property which was claimed by a third party, the plaintiff in the present action. The cause of action stated in the amended petition was in trespass for seizing and carrying away personal property belonging to plaintiff. The amendment was held to be a change of the cause of action.

§ 973. **Actions ex delicto not interchangeable.**— Actions arising *ex delicto* are not interchangeable by amendment.[4] In the original petition plaintiff alleged that one H had purchased goods of him on the false representation of his solvency, and subsequently sold the goods to defendant, who received and paid for them, knowing that H had not paid plaintiff and that H was insolvent; he then alleged that plaintiff had demanded the goods of defendant, who refused to deliver them and had converted them to his own use. At the trial an amended petition was filed alleging that defendant, knowing that H was insolvent and indebted to plaintiff for the goods, fraudulently colluded with H to cheat and defraud plaintiff, and in pursuance thereof pretended to purchase the goods from H. It was held that the amendment was improper, because it changed the cause of action from one in trover to an action of fraud and deceit.[5] Where the amended petition states a cause of action for treble damages for trespass under the statute,[6] it sets out a different cause of action from that stated in the original petition, which was

[1] Dobson v. Winner, 26 App. 329. See also Yeater v. Hines, 24 App. 619; Corrigan v. Brady, 38 App. 649.

[2] Scovill v. Glassner, 79 Mo. 449.

[3] 69 Mo. 170.

[4] Pruett v. Warren, 71 App. 84.

[5] Parker v. Rodes, 79 Mo. 88; Pruett v. Warren, 71 App. 84.

[6] Rev. Stat. 1899, sec. 4572.

for single damages for the same trespass.[1] Nor can an action under the section just cited, praying for treble damages for cutting down timber on plaintiff's land, be changed by amendment into an action of trover for the timber.[2]

**§ 974. Action on joint and action on several contract.**— Where there is an action on a joint contract, and the amendment changes it to an action on a several contract, there is an entire change in the cause of action.[3]

**§ 975. When there is a change in the prayer for relief.**— Where the original and amended petition are exactly alike in every respect except as to the prayer, but they differ materially in that respect, it does not follow that the cause of action has been changed, since the cause of action is determined by the facts pleaded and not by the relief which is prayed.[4] Where in a suit to set aside a deed the petition contains a prayer for general relief, plaintiff may properly be permitted to so amend it that it shall contain a prayer for a writ of possession.[5]

**§ 976. Cases illustrating the rules as to changing cause of action.**— Where the purpose of the amendment is merely to set out a correct description of the land sued for, it does not constitute a change in the cause of action;[6] as, for instance, where the action is for the wrongful removal of fences, in which case a correct description of the land may be substituted for an incorrect one.[7] And where the action is for cutting and converting timber on plaintiff's land, an amendment of the petition so as to make specific the lands from which the timber was cut is permissible.[8] In *Fields v. Maloney*,[9] the petition before amendment sought a partition of certain lands, and for an accounting as to the rents and profits. The amended petition was in the nature of an action of ejectment with a prayer for rents and profits, and damages for the detention of the land. This was held to be the substitution of a new cause of action.[10] An original petition declared on a trust agreement, which contained certain conditions, a compliance with which must have been

[1] Holliday v. Jackson, 21 App. 660.

[2] Missouri Lumber & Mining Co. v. Zeitinger, 45 App. 114.

[3] Slaughter v. Davenport, 151 Mo. 26.

[4] Holt County v. Cannon, 114 Mo. 514; Liese v. Meyer, 143 Mo. 547.

[5] Harlan v. Moore, 132 Mo. 483. As to amending prayer after a default see § 311, *ante*.

[6] Calleghan v. McMahan, 33 Mo. 111.

[7] Sage v. Tucker, 51 App. 336.

[8] Waverly Timber & Iron Co. v. St. Louis Cooperage Co., 112 Mo. 383.

[9] 78 Mo. 172.

[10] But see Hughes v. McDivitt, 103 Mo. 77; Spurlock v. Railroad, 104 Mo. 658.

shown to sustain the action. The amended petition stated a plain cause of action for money loaned unconditionally and then due. The amendment was held to change the cause of action.[1] Where, in an action upon a special tax-bill, the tax-bill is held to be illegal and defective, plaintiff may obtain from the city an amended and perfected tax-bill, and then file an amended petition declaring on the tax-bill as amended.[2]

§ 977. **Same — In attachment cases.**— One suing by attachment cannot amend his petition by so changing the cause of action as to maintain the attachment against a plea in abatement; but where defendant appears and files an answer in bar, the petition may be amended in the same manner and for like reasons as in other actions.[3]

§ 978. **Same — In mechanics' lien cases.**— Since courts should be liberal in the granting of the right to amend a petition in a mechanic's lien case in order to save the special limitation governing such actions,[4] an amendment of a petition, made after the time limited for the bringing of the suit, which changes the original petition only by alleging the time of filing the lien, and by correcting the name of the principal contractor, is properly allowed.[5] So is an amendment striking out that part of the petition which describes the defendant owner as widow and administratrix, and which describes the property, and which seeks a lien, leaving the cause of action one for work done and materials furnished. Such amendment does not constitute a change of the cause of action.[6]

§ 979. **Same — In replevin cases.**— Where the plaintiff in replevin fixes the value of the property in his petition, it is no abuse of the court's discretion to refuse to allow him to so amend the petition as to reduce the valne.[7]

§ 980. **Same — In actions against carriers.**— Plaintiff brought an action against a common carrier for the value of a trunk, which it was alleged defendant had failed to deliver to plaintiff. While the suit was pending the trunk was delivered to plaintiff in a damaged condition, whereupon he amended his petition so as to allege that fact, and to claim the damages accruing from the injury to the trunk. It was held that the cause of action was not changed.[8] In another action against a carrier for failing to de-

[1] Heman v. Glann, 129 Mo. 325.
[2] Galbreath v. Newton, 45 App. 312.
[3] Fordyce v. Hathorn, 57 Mo. 120.
[4] Hannon v. Gibson, 14 App. 33.
[5] Newman v. Jefferson City, L. & S. W. R. Co., 19 App. 100.
[6] Shaffner v. Leahy, 21 App. 110.
[7] Selking v. Hebel, 1 App. 340.
[8] Lawrence v. Atchison, T. & S. F. R. Co., 61 App. 62.

liver goods, the petition alleged that the goods were improperly delivered to a connecting carrier, but did not allege that the original carrier was advised at the time the contract was made that the goods would not be received by the consignee if they were shipped through such connecting carrier. An amended petition, which contained this latter and additional averment, was held proper as not changing the cause of action.[1] In another action the original petition averred that the goods were delivered to defendant for transportation to Santa Anna; that the liability of the defendant was confined to its own line; that it negligently failed to deliver the goods to a connecting carrier, by reason of which they did not reach their destination within a reasonable time; that plaintiff was therefore compelled to duplicate the shipment; and that about a year thereafter a portion of the goods was delivered to plaintiff in a damaged condition, but the remainder was wholly lost. The amended petition charged an absolute contract to transport the goods from St. Louis to Santa Anna, and that the loss of the goods was attributable to the negligence of the defendant, instead of to that of the connecting carrier. The amended petition was held not to change the cause of action.[2] An original petition alleged that plaintiff had been compelled to pay $83 to discharge a lien for warehouse and elevator charges on goods which had been shipped over defendant's line, and that he had been subjected to these charges by reason of defendant's negligence. By an amendment, plaintiff charged that he had been compelled to pay $63 for warehouse and elevator charges, and $20 additional freight, all made necessary by defendant's delay in delivering the goods. It was held that this amendment did not change the cause of action, since both the original and amended statements were based upon the breach of defendant's undertaking safely and without unnecessary delay to transport and deliver the goods to its connecting carrier, with directions similar to those contained in the way-bill on which the goods were shipped.[3] A petition contained two counts, one in equity to reform portions of the contract of shipment as having been agreed to by mistake, and the other for damages. There was a trial of the equity count, but it was dismissed before submission. Plaintiff then filed an

[1] Chandler Commission Co. v. Nashville, C. & St. L. R. Co., 64 App. 144.

[2] Schwab Clothing Co. v. St. Louis, I. M. & S. R. Co., 71 App. 241.

[3] Hall v. Wabash R. Co., 80 App. 463.

amended petition which was practically the second count of the original petition, and this course was held to be proper.[1]

§ 981. **Same — In actions against railroad companies.**— In an action against a railroad company for death, the original petition stated that defendant recklessly, carelessly and negligently caused one of its trains to strike, wound and kill the deceased. The amended petition, which was filed after the expiration of the statutory time, charged that the deceased was struck and killed by the negligence and unskilfulness of defendant's employees while running the train. It was held that the amendment set up no new cause of action.[2] In an action against a railroad company for injury to live-stock, the statement originally filed alleged that the injury was caused by a failure of the company to erect and maintain cattle-guards. The amended statement charged the same injury, but alleged that it occurred in consequence of the failure of the company to construct a crossing where its road crossed a public highway, and it was held that the amended petition did not change the cause of action.[3]

§ 982. **Same — Action by employee.**— In an action for personal injuries received by an employee, the petition charged that the machinery by which plaintiff was injured was operated by defendant both as a hot water and steam heater and drier, while it was constructed for, and intended to be used only as, a steam heater and drier. The petition was amended by charging that the change from a steam heater and drier to both a steam heater and drier and a hot-water heater and drier was a deceptive change. It was held that this did not change the cause of action.[4]

§ 983. **Introducing matter occurring after suit brought.**— Section 618[5] provides that an answer or replication may allege facts which have occurred since the institution of the suit. Section 663[5] further provides that a party may be allowed on motion to file an amended or supplemental petition, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment. These provisions recognize the right to bring before the court by amendment matters arising after the filing of the petition, where they simply enlarge the extent of the relief asked, as by alleging a continuance of the same wrong.[6] But, whatever may be the rule in suits

[1] Bowring v. Wabash R. Co., 77 App. 250.

[2] Moody v. Pacific R. Co., 68 Mo. 470.

[3] Lincoln v. St. Louis, I. M. & S. R. Co., 75 Mo. 27.

[4] Glover v. American Hominy Flakes Co., 76 App. 103.

[5] Rev. Stat. 1899.

[6] Ward v. Davidson, 89 Mo. 445.

in equity, in actions at law the cause of action must be complete at the date of its institution, and filing an amended petition does not open up to plaintiff a cause of action which accrued after the original petition was filed; such an amended petition can operate only as a restatement in different language or in a more complete manner of a cause of action which existed at the beginning.[1] Still, a party, whether plaintiff or defendant, may by a supplemental pleading (and this means by an amended pleading complete in itself) introduce facts which have transpired since the suit was brought, which go to strengthen the cause of action or the defense.[2] If the cause of action is complete when the suit is brought (as it must be), the amended petition may state such additional acts of non-performance of the conditions of the contract as tend to increase the damages, though such acts have occurred between the commencement of the suit and the filing of such amended petition. The other and additional actionable facts which may be embraced in such amended or supplementary petition must be of the same kind, must belong to the same group, and must be cognate to those constituting the cause of action stated in the original petition.[3] So, in a proceeding between tenants in common to obtain an accounting, in which the petition charges the defendant with committing acts of waste, the petition may be amended so as to include a continuation of the acts constituting waste after the date of the filing of the original petition, whether the proceeding be an action at law or a suit in equity.[4] In an action of ejectment the petition may be amended by adding a count asking for the cancellation of certain deeds to defendant of the land in suit.[5] A petition may be amended so as to make it correspond with changes which have occurred since the commencement of the suit; and new parties, who have since that date become interested in the property involved in the litigation, may be brought in.[6]

[1] Davis v. Clark, 40 App. 515.

[2] Nave v. Adams, 107 Mo. 414; Alfter v. Hammitt, 54 App. 303.

[3] Alfter v. Hammitt, 54 App. 303.

[4] Childs v. Railroad, 117 Mo. 414.

[5] Morrison v. Herrington, 120 Mo. 665.

[6] Reyburn v. Mitchell, 106 Mo. 365. See § 311, *ante;* also the case cited in § 969, note 2. The reader should also consult §§ 627, 671 and 767.

## CHAPTER XLIII.

### THE STAGE OF THE PROCEEDINGS AT WHICH AN AMENDMENT MAY BE ALLOWED.


§ 984. The statutory provisions.
985. Amendments as of course.
986. After publication.
987. After demurrer or motion sustained.
988. After a change of venue.
989. At the trial.
990. Allowance at the trial is discretionary.
991. Applications of the rule.
992. Amending the answer at the trial.
993. Amending after the evidence is all in.
995. Same — Abandoned pleading cannot be amended.
996. Same — Amending answer or reply.
997. Same — Cases illustrating the rules.
999. Same — Dividing petition into counts.
1000. Amending after the argument is closed.
1001. After verdict or judgment.
1002. Same — When amendment is not allowable.
1003. Same — Pleading to the amendment.
1004. Amending after the dissolution of an injunction.


**§ 984. The statutory provisions.**— Our statute is not only liberal in the matter of amendments, but it is equally liberal as to the time when they may be made, only providing that they shall not be made under such circumstances as would work a prejudice to the opposite party. Section 657[1] provides for amendments before final judgment. It permits the court, at any time before final judgment, in furtherance of justice and on such terms as may be proper, to amend any record, pleading, process, entry, return or other proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, if the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Section 660[1] provides for amendments even after final judgment. It permits the court after the final judgment, in furtherance of justice and on such terms as may be just, to amend in affirmance of such judgment any record, pleading, process, etc., by adding or striking out the

[1] Rev. Stat. 1899.

name of a party, or by correcting a mistake in the name of a party or in any other respect, or by rectifying defects or imperfections in matters of form. Furthermore, section 659[1] provides that the court shall in every stage of the proceeding disregard any error or defect in the pleading or proceedings which shall not affect the substantial rights of the adverse party. If there is a variance between the pleading and the proof, and such variance is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs.[2] Under section 658,[3] if a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in by an amendment to the petition, or by a supplemental petition and a new summons. Section 661[3] provides that the petition or the answer may be amended of course, without costs and without prejudice to the proceeding already had, at any time before the answer or reply is filed; and section 662[3] allows a reply to be amended upon such terms as may be just at any time before the jury is sworn or the cause is submitted to the court. By section 663[3] a party is permitted to file an amended or supplemental pleading alleging facts material to the cause or praying for any other or different relief, order or judgment. Under sections 664 and 665[3] the plaintiff may, at any time before the jury is sworn or the cause is submitted to the court, strike out or withdraw any part of his petition; and no objection to such action shall be valid that would not be valid after a finding of the issue for the plaintiff. Section 668[3] provides for an opportunity to the adverse party to answer or reply to any amended pleading. By the provisions of section 673,[3] any omissions, imperfections, defects or variances enumerated in the statute of jeofails,[4] and all others of a like nature, not being against the right and justice of the matter, and not altering the issues between the parties, shall be supplied and amended by the court where the judgment is given, or by the appellate court. Finally it is provided that courts shall so construe the provisions of law relating to pleading, and so adapt the practice thereunder, as to discourage as far as possible negligence and deceit, to prevent delay, to secure parties from being misled, to place the party not in fault as nearly as possible in the same condition he would be in if no mistake had been made, to distinguish between form and substance, and

[1] Rev. Stat. 1899.
[2] Rev. Stat. 1899, sec. 656.
[3] Rev. Stat. 1899.
[4] Rev. Stat. 1899, sec. 672.

to afford known, fixed and certain requisites in place of the discretion of the court or judge.[1] All these statutory provisions are by section 675[2] made to apply to suits by the state, to actions for penalties, to writs of *mandamus*, prohibition, *quo warranto* and *scire facias;* they do not extend to criminal proceedings.

§ 985. **Amendments as of course.**— A petition or answer may be amended of course without costs, and without prejudice to the proceeding already had, at any time before the answer or reply thereto is filed.[3] And a reply may be amended upon such terms as may be just at any time before the jury is sworn or the cause submitted to the court.[4] At that stage of the case a defendant may amend his answer by interposing for the first time the statute of limitations.[5] Section 662[6] has not been so interpreted as to prohibit the court from allowing a reply to be amended during the trial, since section 657[6] provides that the court may at any time before final judgment amend any pleading, or cause the pleading to be so amended, as to conform to the facts proved.[7] It was held by the supreme court prior to the adoption of the Code, that the plaintiff might amend by changing his surname from Bizet to Boisse, and then take judgment by default.[8] It is safe to assume that an equal liberality would be shown under the Code.

§ 986. **After publication.**— A petition cannot be amended after publication, where there has been no personal appearance of the defendant.[9]

§ 987. **After demurrer or motion sustained.**— A pleading may always be amended after a demurrer to it has been sustained, or the whole or some part of it has been stricken out on motion, or it has been otherwise successfully attacked.[10] The only limit to this rule is that, if a third successive pleading has been by the court adjudged insufficient, the party is not permitted to file any further pleading, but judgment must be rendered as though no pleading had been filed by him.[11] While there may be a ques-

[1] Rev. Stat. 1899, sec. 676.

[2] Rev. Stat. 1899.

[3] Rev. Stat. 1899, sec. 661.

[4] Rev. Stat. 1899, sec. 662; Bradley v. Phœnix Ins. Co., 28 App. 7; Morrison v. Herrington, 120 Mo. 665.

[5] Bradley v. Phœnix Ins. Co., 28 App. 7.

[6] Rev. Stat. 1899.

[7] Sheehan Trans. Co. v. Sims, 36 App. 224.

[8] Boisse v. Langham, 1 Mo. 572.

[9] Janney v. Spedden, 38 Mo. 396; Leavenworth Terminal R. & B. Co. v. Atchison, 137 Mo. 218.

[10] Rev. Stat. 1899, secs. 621–623.

[11] Rev. Stat. 1899, sec. 623; Beardslee v. Morgner, 73 Mo. 22; Spurlock v. Mo. Pac. R. Co., 93 Mo. 13, 93 Mo. 530; Barton v. Martin, 54 App. 134.

tion whether a plea in abatement in an attachment suit may be amended in substance after a demurrer to it is sustained, a clerical error in it may certainly be amended; as, for instance, by inserting the word "not."[1] Where a plea in abatement is interposed on the ground that a corporation is sued by a wrong name, plaintiff may be permitted to amend both the petition and the summons by inserting the correct name, defendant being entitled to its costs.[2]

§ 988. **After a change of venue.**— Where a change of venue has been granted, and the cause has been transferred to the court to which it was ordered removed, an amendment of the petition may be made in that court.[3] This rule has recently been carried to a great length in *Fears v. Riley*.[4] The court to which the cause was taken on change of venue, which change was granted on the application of defendant, permitted plaintiff to amend his petition by increasing the amount asked for, and by bringing in new defendants who resided in other counties, and to bring in such other defendants by new process. It furthermore permitted plaintiff, after such amendment had been made and process had been served upon the new defendants, to dismiss the petition as to the original defendant who resided in the county where the suit was originally brought. And the supreme court held that the lower court had the power to do all these things.

§ 989. **At the trial.**— Where parties have made up the issues by their pleadings, and gone to trial, and introduced evidence in support of them, the issues can be changed only by amending the pleadings, and this is ordinarily done on terms.[5] Amendments are allowed at the trial in order to conform the petition to the proof, and to avoid a nonsuit on account of a variance, if the amendment does not change the cause of action.[6] If defendant is not ready to meet the case as amended, his remedy is by an application for a continuance.[7] Plaintiff may amend at the trial

[1] Cayce v. Ragsdale, 17 Mo. 32.

[2] Green v. Supreme Lodge, 79 App. 179. The court does not particularize in its opinion the costs to which the defendant is entitled, but presumably it intended to include all costs which had accrued prior to the making of the amendment. See § 1011, *post*.

[3] Stearns v. St. Louis & S. F. R. Co., 94 Mo. 317; Hughes v. McDivitt, 102 Mo. 77; Spurlock v. Mo. Pac. R. Co., 104 Mo. 658.

[4] 148 Mo. 49.

[5] Mays v. Pryce, 95 Mo. 603. See § 1011, *post*.

[6] Butcher v. Death, 15 Mo. 271; McMurry v. Martin, 26 App. 437; Coleman v. Drane, 116 Mo. 387.

[7] McMurry v. Martin, 26 App. 437; Pence v. Gabbert, 70 App. 201. See § 1008, *post*.

by setting out the items that go to make up his claim for special damages without changing his cause of action.[1] If after a deposition has been put on file, but before it has been offered in evidence, plaintiff asks leave to amend his petition to make it conform with the testimony contained in the deposition, the amendment should be allowed.[2] Even after a party wishing to take advantage of a variance has claimed a surprise, and shown by his affidavit the grounds of the surprise, the court may well allow the other party to amend.[3] The adding or the substitution of a party is allowable at the trial.[4]

§ 990. **Allowance at the trial is discretionary.**—The allowance of amendments at the trial is within the sound discretion of the court;[5] especially where the amendment is merely formal, and does not substantially change the cause of action.[6]

§ 991. **Applications of the rule.**—Where a promissory note sued on varied from the one recited in the petition by the omission from the petition of the word "pay," an amendment of the petition was properly permitted at the trial.[7] So, too, the words "and harness" may be added, where they have evidently been omitted by oversight.[8] If in the caption of a petition the sign "&" is by mistake introduced between the christian and surname of a party, so as to make it read as though it were a firm, the "&" may be summarily stricken out.[9] Where the instrument sued on is designated as a lease, but it appears on the trial to be merely a mining license, and it appears further that defendant was fully apprised of the contents of the instrument, plaintiff may be permitted to amend at the trial. "The cause of action proved," says the court, "is essentially the one stated, namely, the breach of the covenant in a deed. The deed is sufficiently identified, and the only objection to the petition is that it gives the deed a wrong name. The covenant broken is in the deed produced." Therefore such an amendment does not change the cause of action.[10] In an action upon a promissory note, where, to

[1] Pence v. Gabbert, 70 App. 201.

[2] Waverly Timber & Iron Co. v. St. Louis Cooperage Co., 112 Mo. 383.

[3] Brown v. Kansas City, St. J. & C. B. R. Co., 20 App. 427.

[4] Tayon v. Ladew, 33 Mo. 205; Wellman v. Dismukes, 42 Mo. 101.

[5] Greene v. Gallagher, 35 Mo. 226; Ferguson v. Hannibal & St. J. R. Co., 35 Mo. 452; Roberts v. Lynch, 15 App. 456; Hixon v. Selders, 46 App. 275.

[6] Glasscock v. Glasscock, 8 Mo. 577; State ex rel. v. Gage, 52 App. 464. See also § 992 *et seq.*, *post*.

[7] Atwood v. Gillespie, 4 Mo. 423.

[8] Huffer v. Riley, 47 App. 479.

[9] Hite v. Hunton, 20 Mo. 286.

[10] Boone v. Stover, 66 Mo. 430, 436.

avoid the bar of the statute of limitations, plaintiff alleges a payment made by the defendant within ten years, and the evidence shows that the payment was made by a co-maker of the defendant, the petition may be amended at the trial to make it conform to the evidence.[1] By a contract entered into between the parties defendant agreed to sell plaintiff certain real estate for which plaintiff paid $500 down. As a part of the agreement defendant was to deliver to plaintiff a complete abstract of title within ten days. Defendant failing to furnish the abstract, plaintiff sued to recover the $500 paid, alleging that time was of the essence of the contract. Upon the trial it appeared that the provision as to time being of the essence of the contract appeared in a duplicate of the contract retained by the plaintiff, but was, without plaintiff's knowledge, erased in the copy retained by defendant, and that therefore the minds of the parties did not meet, and there was no agreement, though the money had been paid and received under the belief that there was a contract. It was held that the court properly permitted plaintiff to amend his petition at the trial to conform to this state of facts, since the amendment is not a substantial change of the original cause of action, which was in itself a form of the action for money had and received.[2]

**§ 992. Amending the answer at the trial.**— The defendant may in a proper case be permitted to file an amended answer at the trial; but this is within the discretion of the court.[3] If the evidence discloses a defense not set up in the answer, defendant may be allowed to amend his answer so as to make it conform to the evidence, provided the defense is not substantially changed.[4] But he cannot amend by denying facts which he admitted in his original answer.[5] Nor is the court bound to permit an amendment of an answer after the trial is begun, if it substantially changes the defense.[6] And the court cannot be said to have abused its discretion in refusing to allow defendant to amend his answer by stating facts which were known to him when the original answer was filed and which would change the character of his defense, where such amendment is asked after the filing of

[1] Bennett v. McCanse, 65 Mo. 194.

[2] Corrigan v. Brady, 38 App. 649. See, for further illustrations, § 997, *post*.

[3] Weed Sewing Machine Co. v. Philbrick, 70 Mo. 676.

[4] Irwin v. Chiles, 28 Mo. 576; Garton v. Cannada, 39 Mo. 357.

[5] Harrison v. Hastings, 28 Mo. 346.

[6] Corby v. Wright, 4 App. 443; Clark v. St. Louis Transfer Co., 127 Mo. 225. See Joyce v. Growney, 154 Mo. 253.

the report of the referee, and after defendant's exceptions to such report have been overruled.[1] An amendment withdrawing a defense is permissible at any time, though its effect be to give the defendant the opening and closing.[2]

§ 993. **Amending after the evidence is all in.**— It is no abuse of the court's discretion to permit an amendment of the petition after the evidence is all in, where the cause is continued and defendant has the opportunity to answer, and the case is retried at the next term.[3] If a state of facts not set forth in the pleadings is developed at the trial the pleadings should be amended.[4] And the amendment may be allowed even after the instructions have been given to the jury.[5] In fact, if the evidence shows a different state of facts from those set forth in the pleading, and the party desires an instruction in accordance with those facts, he must first amend his pleading so as to make it conform to the proofs.[6] If plaintiff fails to prove the allegations of his petition, but does prove facts which entitle him to recover, he should be allowed to amend his petition,[7] that he may have such relief as the proof shows he is entitled to.[8] A refusal to allow such an amendment is reversible error.[9] If defendant omits to show by affidavit wherein he was misled or prejudiced by the amendment, he is in no situation to complain of it.[10] If the action is on an account, an item which is developed by the proof may be added to the account.[11] An amendment of the caption of a petition may be made after the evidence is in.[12]

§ 994. In courts of chancery it is the invariable practice to allow the amendment of the bill after evidence is taken, so as to make it conform to the proof, and to bring in such new parties as are essential to a complete determination of the matters in controversy.[13]

§ 995. **Same — Abandoned pleading cannot be amended.**— The doctrines stated above are not to be extended so as to cover a pleading, or a part of a pleading, which has been abandoned. While an amendment of a pleading upon which the parties have gone to trial is properly allowable at the close of the case, it is

[1] Singer Mfg. Co. v. Givens, 35 App. 602. See also § 996, *post*.

[2] Boatmen's Sav. Inst. v. Forbes, 52 Mo. 201.

[3] Dameron v. Jamison, 4 App. 299.

[4] Newman v. Kenton, 79 Mo. 382.

[5] Hanson v. Jones, 20 App. 595.

[6] Budd v. Hoffheimer, 52 Mo. 297.

[7] Barclay v. Bates, 2 App. 139; Howard v. Shirley, 75 App. 150.

[8] Collins v. Glass, 46 App. 297.

[9] Carr v. Moss, 87 Mo. 447.

[10] Wetzell v. Wagoner, 41 App. 509.

[11] Sprague v. Follett, 90 Mo. 547.

[12] State v. Sandusky, 46 Mo. 377.

[13] Pratt v. Walther, 42 App. 491.

not to be permitted as to a pleading which has been abandoned, stricken out, or otherwise ruled out of consideration.[1] In a case illustrating this rule, the petition contained four counts. At the beginning of the trial defendant objected to any evidence under either count, on the ground that neither count stated a cause of action, which objection was sustained as to the first and fourth counts. Thereupon the case was tried upon the second and third counts. At the close of plaintiff's evidence the court permitted him to amend the first count, and plaintiff recovered a verdict on that count alone. It was held that the action of the court was erroneous.[2] But where plaintiff has obtained judgment on the first count of a petition, and the judgment is reversed in the appellate court on account of error pertaining to a subsequent count, plaintiff may, upon the remanding of the cause, amend his first count so as to claim a recovery of a larger amount than he claimed in the original first count.[3]

§ **996. Same — Amending answer or reply.**— An answer cannot be amended after trial and submission to the court, so as to introduce new matter of defense.[4] Nor should an amendment of the answer be allowed after the evidence is in, if there is no evidence to support the amendment.[5] Plaintiff may be permitted to file a reply to the answer after he has rested his case on the evidence.[6]

§ **997. Same — Cases illustrating the rules.**— After the evidence is all in the court may properly permit the petition to be so amended as to set out the proper corporate name of the defendant.[7] Where the suit was to set aside a settlement *inter partes*, and to recover a balance which had been erroneously paid, the defendant relied in his answer on a settlement which was made prior to the one assailed in the petition. It developed at the trial that the error complained of originated in this former settlement, and plaintiff asked leave at the close of the case to amend his petition by setting up the former settlement and charging fraud and mistake in its procurement, and leave to make such amendment was properly granted.[8] Where the petition alleged that certain real estate was paid for in cash, but the evidence showed that it was paid for by the conveyance of other real estate, the plaintiff may amend his petition so as to make it

[1] Cash v. Penix, 11 App. 597.
[2] Renfro v. Price, 22 App. 403.
[3] Weber v. Squier, 51 App. 601.
[4] Irwin v. Chiles, 28 Mo. 576; Garton v. Cannada, 39 Mo. 357.
[5] Saare v. Union R. Co., 20 App. 211.
[6] Collins v. Glass, 46 App. 297. See also § 992, *ante*.
[7] Meyer v. Insurance Co., 73 App. 166.
[8] Welday v. Jones, 79 Mo. 170.

conform to the facts.[1] In an action to recover a money judgment and to enforce a mechanic's lien, the answer averred that the sum sued for was not due at the date of filing the answer, nor on the 6th of January, 1872, though the suit was not commenced until January 14, 1872. On a second trial of the case, after the evidence was all in, defendant asked leave to amend by averring that the sum was not due when the action was commenced, and leave to file such amendment was, under the circumstances, properly refused.[2]

§ 998. A bill in equity was filed by a married woman against her husband and certain of his children to cancel certain deeds made by the husband to the two children in fraud of plaintiff's rights. The allegations were that under the marriage agreement the husband was to convey certain property to the wife; that he did deliver to the wife a deed purporting to carry out the agreement, but which did not convey to her a fee-simple title; that afterwards he voluntarily and without consideration conveyed the same land to his children, for the purpose of preventing plaintiff from obtaining her rights in the matter. Upon the trial it developed that the husband had made a second deed to his wife correcting the defects of the first deed, but the wife still claimed that in the *interim* between the execution of the two deeds the husband had conveyed the property to his children, as alleged in the petition. At the trial, and after these facts had been brought out by the evidence, the trial court permitted plaintiff to amend her petition by setting up the fact that the two deeds had been executed by the husband to her. The supreme court held this to be proper, inasmuch as the gist of the action was that, when the conveyance was made to the children, the fee-simple title did not appear to be in the wife, and therefore the amendment merely conformed to the proof, and did not change the cause of action.[3]

§ 999. **Same — Dividing petition into counts.**— In an action against a railroad company for killing stock, where two causes of action are blended in a single count, plaintiff may at the close of the evidence amend his petition so as to specify in separate counts the precise dates when the respective injuries occurred.[4]

§ 1000. **Amending after the argument is closed.**— It is proper to permit the plaintiff, after the evidence is all in and the argu-

[1] Kerr v. Bell, 44 Mo. 120.
[2] Simmons v. Carrier, 68 Mo. 416.
[3] Harlan v. Moore, 132 Mo. 483.
[4] Sinclair v. Mo., K. & T. R. Co., 70 App. 588.

ment of counsel has been made, to amend his petition so as to make it conform to the proofs.[1]

**§ 1001. After verdict or judgment.**— A petition may be amended after the entry of the judgment to rectify a formal defect which might have been cured by amendment before or during the trial.[2] Where, in an action of ejectment, the petition erroneously uses the word "east" instead of "west" in describing the land, the court may at the next term, the motion for a new trial having been continued, permit an amendment of the petition, and may correct the verdict to conform to the new petition.[3] And even after defendant's motion for a new trial in such an action has been overruled, the court may permit the *ad damnum* clause of the petition to be amended to conform to the proof, though it increases the plaintiff's claim for damages from $100 to $500.[4] In an action for a breach of covenant the plaintiff claimed damages as the immediate effect of his eviction as covenantee, but upon the trial it appeared by evidence which was received without objection that the eviction was suffered by the covenantee of plaintiff, and that plaintiff had indemnified him, so that plaintiff's real claim was to be reimbursed by his covenantor for this outlay; both sides treated the damages so sustained as within the scope of the petition, and plaintiff's recovery did not exceed the amount which he paid his covenantee. It was held that in such a case the court might properly permit an amendment of the petition even after judgment.[5] In an action upon an insurance policy it is essential that the petition should contain an allegation of plaintiff's ownership of the property at the time of the loss. If, however, the petition does not contain such an allegation, but the case is tried as if the fact of ownership was in issue, the petition may, after a verdict in plaintiff's favor, be amended by adding the allegation, since such amendment does not alter the issue.[6] Where a party has no interest in the suit, is neither a necessary nor a proper party, but through inadvertence he has been made a plaintiff, it is not error to permit an amendment of the petition by striking out his name,

[1] Blair v. C. & A. R. Co., 89 Mo. 383; Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261.

[2] Rev. Stat. 1889, secs. 660, 673; Lamb v. St. Louis, C. & W. R. Co., 33 App. 489.

[3] Acton v. Dooley, 16 App. 441.

[4] McClannahan v. Smith, 76 Mo. 428.

[5] Jones v. Whitsett, 79 Mo. 188. See, in this connection, § 311, *ante*.

[6] Cagle v. Chillicothe Mut. F. Ins. Co., 78 App. 431.

even after judgment; and his name may also be stricken out of the judgment itself.[1]

**§ 1002. Same — When amendment is not allowable.**— The statute of jeofails[2] is intended to cure all defects of form, and to permit the correction of many errors of substance. Nevertheless it does not authorize an amendment of plaintiff's case, nor of the defendant's defense, into a shape not supported by the evidence at the trial, where such change would prejudicially affect the rights of defendant.[3] Thus in an action founded on the death of a minor child, the two plaintiffs alleged that they were his parents, and a verdict was rendered in their favor, though the relationship was denied by the answer. It appeared on the motion for new trial that the child was born before the marriage of plaintiffs, and thereupon the court granted leave to the female plaintiff to amend the petition and verdict by striking out the name of the father, and then allowed the judgment to stand in favor of the mother for the full amount of the verdict. It was held that such an amendment was not permissible.[4] A bill in equity was filed by a judgment creditor of one of the defendants to have certain chattel mortgages executed by such defendant to his co-defendant declared fraudulent and void, and to compel the co-defendant to account to plaintiff for the proceeds realized from such mortgages. After the decree was entered plaintiff sought to amend his petition in order to show that the mortgages in question and an assignment which was made by the mortgagor for the benefit of his creditors were all part of one transaction, and that, therefore, the preference attempted to be given by the mortgages was in contravention of the assignment laws of the state. It being evident that the original petition was not drawn on any such theory, because if it had been the assignee in the deed for the benefit of creditors would have been not only a proper but a necessary party, the court properly refused permission to make the amendment.[5]

**§ 1003. Same — Pleading to the amendment.**— Where a defendant, three days after the entry of final judgment, asked per-

[1] Powell v. Banks, 146 Mo. 620.

[2] Rev. Stat. 1899, sec. 672. See § 886, *ante*.

[3] Farwell v. Meyer, 67 App. 566; Saare v. Union R. Co., 20 App. 211.

[4] Habel v. Union Depot R. Co., 140 Mo. 159.

[5] Farwell v. Meyer, 67 App. 566.

That the petition cannot be amended in substance after a default, see Terminal Ry. Co. v. Atchison, 137 Mo. 218, 230.

mission to file an amended answer to an amended petition, the court did not abuse its discretion in refusing the permission, although the amended petition was not filed until the time of entering the judgment, the amendment being merely for the purpose of conforming the petition to the facts proved.[1]

**§ 1004. Amending after the dissolution of an injunction.**—A proposed amendment of a petition to conform to the proofs is properly refused if not offered until after the dissolution of an injunction.[2]

[1] Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261. It has also been held that a supplemental answer cannot in any case be filed after judgment, unless the judgment is first set aside. Murphy v. De France, 23 App. 337.

[2] Cabanne v. Spaulding, 14 App. 312.

## CHAPTER XLIV.

### EFFECT OF AMENDING — TERMS.


§ 1005. Effect of amending.
1006. Notice of amendment.
1007. Effect on statute of limitations.
1008. Working continuance.
§ 1009. Effect of failing to amend.
1010. Pleading to amended pleading.
1011. The court may impose terms.


**§ 1005. Effect of amending.**— An amended petition is only a continuance of the original proceeding; it is not the commencement of a new action,[1] and the original and amended petitions do not constitute two separate and distinct actions.[2] When the pleading is amended by the filing of a new pleading, the functions of the former pleading are at an end.[3] The party abandons the original pleading and all matters alleged in it.[4] But any admissions contained in the former pleading are competent evidence against the party who filed it.[5]

**§ 1006. Notice of amendment.**— Defendants who are properly in court must take notice of any amendment of the petition, and need not be again served with process.[6] But under section 638,[7] if a party files any amended or supplemental pleading in vacation, he must give to the adverse party or his attorney a written notice of the time of filing it; and until such notice is duly served the adverse party is not deemed to have notice of its filing for the purpose of pleading.[8]

**§ 1007. Effect on statute of limitations.**— An amendment which introduces a cause of action barred by limitation is in-

[1] Mann v. Schroer, 50 Mo. 306. See next section.

[2] Soulard v. St. Louis, 40 Mo. 144.

[3] Woolfolk v. Woolfolk, 33 Mo. 110; Ticknor v. Voorhies, 46 Mo. 110; Breckenkamp v. Reese, 3 App. 585; Owens, Lane & Dyer Machine Co. v. Pierce, 5 App. 576; Corley v. McKeag, 9 App. 38.

[4] Ticknor v. Voorhies, 46 Mo. 110.

[5] Anderson v. McPike, 86 Mo. 293; Murphy v. St. Louis Type Foundry, 29 App. 541.

[6] St. Louis v. Gleason, 15 App. 25; McLaughlin v. Schawacker, 31 App. 365.

[7] Rev. Stat. 1899.

[8] Many of the courts have adopted a rule that a copy of the amended pleading must be served upon the opposite party; and until the opposite party has received such copy he is not bound to plead to the amendment.

As to effect of taking leave to amend, see § 937, *ante*.

effectual to avoid the statutory bar. The rule is that where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim not before asserted, then it is not treated as relating to the commencement of the suit, but is equivalent to a fresh suit upon a new cause of action, and the running of the statute continues down to the time of filing the amended petition.[1] In the case last cited plaintiff shipped over defendant's railroad a carload of sheep under a written contract, one provision of which was that in case of total loss the sum of $100 per head should be taken as liquidated damages. In his original petition plaintiff set out the contract in general terms, without mentioning the clause as to liquidated damages, and prayed for general damages. In his amended petition he set out this part of the contract and claimed damages under it for such of the sheep as were killed ($100 per head being largely in excess of the actual market value of the sheep), and the damages actually suffered for such sheep as were injured. It was held that, while the cause of action stated in both petitions was for breach of the contract, yet as the claim for liquidated damages was a claim beyond that asserted in the original petition, it was, for the purpose of the statute, a new cause of action. But where the amendment to the petition merely brings a second deed of trust into view for the purpose of foreclosure, the statute of limitations does not operate to bar the proceeding to foreclose under the first deed of trust, that proceeding having been begun within ten years after the maturity of the debt, although the amendment was not made for sixteen years after the debt matured.[2] Where, in an action at law for slander, the reply set up an equitable defense, as to which the statutory time had not then expired, but which under the rulings of the court was afterwards embodied as a separate count in an amended petition, such defense is not barred by the statute, although the statutory time had expired when the amended petition was filed, since the amendment did not interject into the cause a new claim which had not before been asserted.[3] Where a petition in an action for trespass is amended so as to make it state a cause of action for

[1] Buel v. St. Louis Transfer Co., 45 Mo. 562; Baker v. Mo. Pac. R. Co., 34 App. 98.

[2] Long v. Long, 141 Mo. 352.

[3] Courtney v. Blackwell, 150 Mo. 245.

treble damages for the trespass, it will not authorize proof of a trespass which had been committed more than three years prior to the time of filing the amended petition.[1]

§ 1008. **Working continuance.**— When a party amends any pleading, and the court is satisfied, by affidavit or otherwise, that the opposite party cannot be ready for trial in consequence of the amendment, a continuance may be granted to some day of the same term or to the next regular term of the court.[2] The filing of an amended petition does not of itself entitle the defendant to a continuance.[3] If a party feels that he has been prejudiced by a permission to his opponent to amend during the trial, he must file an affidavit to that effect and ask for a continuance.[4] And if he is surprised by the amendment, he is entitled to a continuance at the cost of the adverse party.[5] A mere formal amendment does not afford ground for a continuance.[6] Nor should a continuance be granted where the amendment could not work a surprise.[7] If the opposite party neglects to move for a continuance, he waives the objection that the amendment has worked a surprise on him.[8]

§ 1009. **Effect of failing to amend.**— Where the petition is formally defective, and may be amended, the defect is nevertheless fatal if the plaintiff fails to amend.[9]

§ 1010. **Pleading to amended pleading.**— If any amendment is made to any pleading, the adverse party must be allowed an opportunity, according to the course and practice of the court, to answer or reply to the pleading so amended.[10] Where at the trial plaintiff is permitted to insert a material averment in his petition by way of amendment, and such averment is unanswered by the defendant, it is to be taken as admitted; but if the answer already filed contains a defense to the petition with its

[1] Holliday v. Jackson, 21 App. 660. That amendments are often allowed for the express purpose of saving the bar of the statute is shown in § 943, *ante*.

Since courts take judicial notice of all matters of record in the same cause, it is unnecessary to set out in an amended petition the date of filing the original petition, nor to allege that the original petition was begun within the statutory period. Barth v. Kansas City Elev. R. Co., 142 Mo. 535.

[2] Rev. Stat. 1899, sec. 688.

[3] Colhoun v. Crawford, 50 Mo. 458; Keltenbaugh v. St. Louis, A. & T. R. Co., 34 App. 147.

[4] McMurry v. Martin, 26 App. 437; Hiemenz v. Goerger, 51 App. 586.

[5] Fischer v. Max, 49 Mo. 404.

[6] State ex rel. v. Gage, 52 App. 464.

[7] Pifer v. Stanley, 57 App. 516.

[8] Kuh v. Garvin, 125 Mo. 547.

[9] Elfrank v. Seiler, 54 Mo. 134. But see § 951, *ante*.

[10] Rev. Stat. 1899, sec. 668.

additional averment, the case should proceed to trial just as though the averment had been in the petition at first, and was unanswered.[1] If the defendant files an answer to an amended petition which changes the cause of action, and then goes to trial on the merits, he cannot, after a new trial has been awarded, object to another amended petition on the ground of its being a departure from the petition first filed.[2] Where the petition was amended by leave of court after the evidence was all in and before final judgment, the court properly refused to permit defendant to answer such amended petition three days after the entry of final judgment.[3]

**§ 1011. The court may impose terms.**—Article VI of the Code[4] confers upon the courts ample authority to impose upon a party desiring to amend his pleading such terms as may be just; and amendments should only be allowed on terms which are not prejudicial to the other party.[5] The power of the court to impose costs on the party seeking a radical amendment of his pleading has always been recognized.[6] The party making the amendment may be properly required to pay all the costs which have accrued from the commencement of the suit down to the time of making the amendment.[7] If the variance between the allegation and the proof is not material, and the adverse party could not have been misled to his prejudice, an amendment may be allowed without costs.[8]

[1] Robards v. Munson, 20 Mo. 65.

[2] Spurlock v. Mo. Pac. R. Co., 104 Mo. 658.

[3] Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261.

[4] Rev. Stat. 1899, ch. 8.

[5] Archer v. Merchants' Ins. Co., 43 Mo. 434; Turner v. Chillicothe & D. M. R. Co., 51 Mo. 501; Gaty v. Sack, 19 App. 470; Stewart v. Glenn, 58 Mo. 481; Waverly T. & I. Co. v. St. Louis Cooperage Co., 112 Mo. 383; Tower v. Pauly, 67 App. 632. See also § 989, *ante*.

[6] Tower v. Pauly, 67 App. 632.

[7] Street v. Bushnel, 24 Mo. 328.

[8] Riddles v. Aiken, 29 Mo. 453.

When the allowance of an amendment will work a continuance is shown in § 1008, *ante*.

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